No. 88-5909-CSY
Status: GRANTED
CAPITAL CASE

Title: Dock McKoy, Jr., Petitioner
v.
North Carolina

Docketed:
November 17, 1988

Court: Supreme Court of North Carolina

Counsel for petitioner: Hunter,Malcolm

Counsel for respondent: Farrell,William, Byers,Joan Herre

Entry	Date	Note	Proceedings and Orders
1	Nov 17 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Dec 16 1988		Order extending time to file response to petition until January 18, 1989.
5	Jan 30 1989		Brief of respondent North Carolina in opposition filed.
6	Feb 2 1989		DISTRIBUTED. February 17, 1989
7	Feb 13 1989	X	Reply brief of petitioner Dock McKoy filed.
9	Feb 21 1989		Petition GRANTED.
			**********
11	Mar 27 1989		Order extending time to file brief of petitioner on the merits until April 22, 1989.
12	Apr 19 1989		Joint appendix filed.
14	Apr 26 1989		Brief of petitioner Dock McKoy filed.
13	May 8 1989		Record filed.
		*	six vol-ncsc
16	May 15 1989		Order extending time to file brief of respondent on the merits until June 10, 1989.
17	Jun 7 1989		Brief amici curiae of California, et al. filed.
18	Jun 12 1989		Order further extending time to file brief of respondent on the merits until June 17, 1989.
19	Jun 16 1989		Record filed.
20	Jun 16 1989		Brief of respondent North Carolina filed.
21	Jul 13 1989		CIRCULATED.
24	Jul 15 1989	X	Reply brief of petitioner Dock McKoy filed.
23	Jul 20 1989		SET FOR ARGUMENT TUESDAY, OCTOBER 10, 1989. (3RD CASE)
25	Oct 10 1989		ARGUED.

EDITOR'S NOTE

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88-5909

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

DOCK McKOY, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Dock McKoy, Jr., who is now confined on death row at Central Prison in Raleigh, North Carolina, seeks leave to file the attached Petition for Writ of Certiorari to the North Carolina Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to U.S. Sup. Ct. Rule 46, 28 U.S.C.

The Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Malcolm Ray Hunter, Jr.
Appellate Defender

David W. Dorey
Office of the Appellate Defender

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N.C. Death Penalty Resource Center

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ATTORNEYS FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

DOCK McKOY, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Dock McKoy, Jr., being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I an entitled to redress; and that the issue which I desire to present on certiorari are the following:

1. Whether this Court's decision in Mills v. Maryland, 486 U.S. ___ (1988), applies to North Carolina?

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition are true.

1. Are you presently employed? No. My last employment was Anson Cty-DOT, 12/20 19~~88~~. and my salary was $520/mo.

2. I have received no income within the past twelve months from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources.

3. I own no cash or checking or savings accounts other than what is on account here at Central Prison. None

4. I own no real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. No one is dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dock McKoy JR
Dock McKoy, Jr.

SWORN TO AND SUBSCRIBED before me, this 10 day of November, 1988.

Ray M. Coppedge
Notary Public

My commission expires: My Commission Expires 8-14-93

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

DOCK McKOY, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

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Of Counsel

QUESTION PRESENTED

DOES NORTH CAROLINA'S CAPITAL SENTENCING PROCEDURE, WHICH EXPLICITLY PRECLUDES JURORS FROM CONSIDERING MITIGATING EVIDENCE UNLESS ALL TWELVE JURORS UNANIMOUSLY FIND IT TO MAKE OUT A MITIGATING CIRCUMSTANCE, VIOLATE THIS COURT'S HOLDING IN *MILLS V. MARYLAND*, 486 U.S. ___ (1988)?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

DOCK McKOY, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

The Petitioner, Dock McKoy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered on September 27, 1988.

OPINION BELOW

The opinion of the North Carolina Supreme Court is officially reported at 323 N.C. 1, 372 S.E.2d 12 (1988), and is reproduced in Appendix "A" of this Petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina affirming Petitioner's conviction and sentence was entered on September 27, 1988.[1] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1257(3) (1982).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

---

[1] The opinion of the Supreme Court of North Carolina was filed on September 7, 1988. In accordance with Rule 32(b) of the North Carolina Rules of Appellate Procedure, the actual judgment of the Supreme Court of North Carolina is entered in the docket by the clerk twenty (20) days after the date of the filing of the opinion.

U.S. Const. amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV: No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

N.C. Gen. Stat. 15A-2000(b): . . . After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following factors: (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist; (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. . . .

STATEMENT OF THE CASE

On September 27, 1988, the Supreme Court of North Carolina entered judgment affirming Petitioner's conviction for first degree murder and his death sentence.

The state presented evidence at trial that on the afternoon of December 22, 1985, defendant was highly intoxicated and was firing a shotgun in a reckless manner. Sheriff's deputies were twice summoned to the rural neighborhood in which he resided. On the first occasion, a deputy attempted to converse with petitioner, but found him to be confused and incoherent. After informing petitioner that he was too drunk, should not fire his gun anymore, but could fire his gun in the woods when he sobered up, the officer left. Upon receiving a report of additional shots, other officers went to the scene. While attempting to convince petitioner to leave his home, a shot was fired from within the house killing one of the deputies.

The state's case was based in substantial part on inculpatory statements elicited from petitioner during custodial interrogation. Petitioner presented expert

testimony that he was legally insane at the time the shot was fired and, additionally, that he had been too intoxicated to form the requisite intent to kill.

At the penalty phase, the state presented evidence in support of two aggravating circumstances - that the victim had been a law enforcement officer, and that petitioner had been convicted of a prior felony involving violence; a 1951 conviction for second degree murder.

Petitioner presented evidence which was relevant to eight mitigating circumstances. That evidence included extensive expert testimony by two state employed forensic psychiatrists that petitioner was under the influence of severe and long standing psychological disorders at the time of the crime. Evidence was also offered concerning petitioner's borderline intelligence, the extent of his mental impairment due to intoxication, his age, and his poor physical health. The jury was expressly instructed that it must be unanimous in order to consider any mitigating circumstance. The jury failed to reach unanimous agreement as to six of the eight mitigating circumstances submitted by the trial court, including the statutory mitigating circumstance that petitioner was under the influence of mental or emotional disturbance at the time of the crime. N.C. Gen. Stat. sec. 15A-2000(f)(2).

On direct appeal to the North Carolina Supreme Court the defendant argued, among other things, that his Eighth and Fourteenth Amendment right to be free from cruel and unusual punishment was violated by North Carolina's procedure which expressly forbids jurors from considering mitigating evidence unless the jurors unanimously agree on the existence of mitigating circumstances relating to that evidence. After this Court issued its opinion in *Mills v. Maryland*, 486 U.S. ___ (1988), the North Carolina Supreme Court ordered supplemental briefing and additional argument solely on the question of whether North Carolina's procedure, employed in this case, runs afoul of *Mills*.

The North Carolina Supreme Court affirmed Petitioner's conviction and sentence of death. Relying on this Court's denial of writs of certiorari in two North

Carolina cases after the decision in *Mills*, and characterizing this Court's decision in *Mills* as having application only to Maryland's capital sentencing procedure, the North Carolina Supreme Court, in the instant case, was "unable to conclude with any degree of certainty that *Mills* rendered [the North Carolina] capital sentencing procedure constitutionally infirm." *State v. McKoy*, 323 N.C. 1, 44, 372 S.E.2d 12, 35 (1988). In dissent, the Chief Justice of the North Carolina Supreme Court noted this Court's cases holding that "the Eighth and Fourteenth Amendments preclude a state from creating barriers to the consideration by a capital sentencer of all evidence which may reasonably be said to have mitigating value," and described the majority's opinion as "stand[ing] *Mills* and the Eighth Amendment jurisprudence upon which it rests on their respective heads." *McKoy*, 323 N.C. at 54, 372 S.E.2d at 45 (1988) (Exum, C.J. dissenting).

The *McKoy* court stated four reasons, urged upon the court by the state, for its inability to conclude that *Mills* applies to North Carolina. First, the Supreme Court of North Carolina read this Court's opinion in *Mills* as applying only to Maryland's capital sentencing scheme. According to the majority of the North Carolina Supreme Court, this Court "granted certiorari in *Mills* '[b]ecause of the importance of the issue in Maryland's capital-punishment scheme.'" *McKoy*, 323 N.C. at 43, 372 S.E.2d at 35 (quoting *Mills v. Maryland*, 486 U.S. at ___ (citations omitted)). Therefore, the North Carolina Supreme Court determined that the decision in *Mills* was "statute-specific." *McKoy*, 323 N.C. at 43, 372 S.E.2d at 35.

Second, the North Carolina Supreme Court suggested that perhaps prohibiting the jury from considering mitigating evidence unless mitigating factors were unanimously found was unconstitutional only where, as in *Mills*, the jury must return a death sentence where aggravating circumstances are found and no factors in mitigation are found. *McKoy*, 323 N.C. at 40, 372 S.E.2d at 33.

Third, the North Carolina Supreme Court noted that, unlike the sentencing procedure condemned in *Mills*, under North Carolina's capital sentencing procedure

evidence of mitigation which is not unanimously found becomes irrelevant as a matter of state law. *McKoy*, 323 N.C. at 40-41, 372 S.E.2d at 33-35.

Finally, the North Carolina Supreme Court relied on this Court's denials of certiorari in *Holden v. North Carolina, cert. denied*, 486 U.S. ___, No. 87-6674 (June 13, 1988) and *Gardner v. North Carolina, cert. denied*, 486 U.S. ___, No. 87-6196 (June 13, 1988) the week after *Mills* was decided to strengthen its position that *Mills* was a statute-specific articulation of constitutional doctrine.

Interestingly, the *McKoy* opinion never affirmatively concluded that, in spite of *Mills*, the North Carolina unanimity requirement is constitutional. Rather, the Court held that factual differences in the respective capital sentencing schemes made it "unable to conclude with any degree of certainty that *Mills* rendered [the North Carolina] capital sentencing procedure constitutionally infirm." *McKoy*, 323 N.C. at 44, 372 S.E.2d at 35.

Three members of the North Carolina Supreme Court filed separate dissenting opinions. Justice Harry C. Martin disapproved of "the admission of inculpatory statements by a sixty-five year old black man with an I.Q. of 74, blind in one eye, his other eye injured and bandaged so that he could not see, wounded and treated at the hospital, with a blood alcohol level of .264, afraid for his life, travelling in a van with officers for over two hours from Anson County to Raleigh, at times cold and thirsty, suffering from his wounds, and being, in the opinion of [the clinical director of the state forensic psychiatry unit] incapable of appreciating the waiver of his constitutional rights." *State v. McKoy*, 323 N.C. at 63, 372 S.E.2d at 38 (Martin, J., dissenting). Justice Henry E. Frye and Chief Justice James G. Exum joined Justice Martin's dissent.

Writing separately, Justice Frye stated that he would also find reversible error based on the fact that "the trial judge both directly told the jury that its verdict was subject to appellate review and, subsequently, sanctioned the state's comments on that subject by overruling defendant's timely objection." *State v. McKoy*, 323 N.C.

at 59, 372 S.E.2d at 39-40 (Frye, J., dissenting). He also found error in allowing the state to secure commitments from jurors not to allow evidence of defendant's intoxication at the time of the crime to influence their verdicts and in allowing the prosecutor to remind jurors of that "promise" during his closing arguments in the penalty phase of the trial. Chief Justice Exum joined Justice Frye's dissenting opinion.

In his own dissenting opinion, in which Justice Frye joined, Chief Justice Exum reiterated his position, first enunciated in *State v. Kirkley*, 308 N.C. 196, 229-31, 302 S.E.2d 144, 163-64 (1983), that North Carolina's unanimity requirement ran afoul of this Court's Eighth Amendment requirement for individualized sentencing consideration of any relevant evidence relating to the character and record of the defendant, or the circumstances of the offense, which the defendant proffered as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 536 (1978). Indeed, Chief Justice Exum rebutted each of the majority's suggested distinctions between North Carolina's and Maryland's capital sentencing schemes, and concluded that these differences were not legally material.

> [w]hatever escape from the *Mills* holding might be provided by differences in Maryland's and North Carolina's capital sentencing scheme or by the posture in which the *Mills* case reached the Supreme Court is effectively closed, it seems to me, by the rationale of the *Mills* decision as expressed in the opinion itself.

McKoy, 323 N.C. at 51, 372 S.E.2d at 43 (Exum, C.J. dissenting).

Chief Justice Exum rejected the majority's rationale -- that North Carolina's unanimity requirement is a mechanism by which the jury determines the legal relevance of proffered mitigating evidence -- as a device created in an effort to take advantage of footnote 7 in *Mills*.[2]

---

[2] In support of its rationale, the *McKoy* majority relied upon footnote 7 of this Court's opinion in *Mills*, which reads: "[n]o one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered 'legally irrelevant' by one holdout vote." *Mills v. Maryland*, 486 U.S. at ___, fn.7.

> [T]he question presented in *Mills* is whether at the ultimate decision-making stage of a capital sentencing proceeding it is constitutionally permissible to preclude any juror from considering [a] mitigating circumstance that juror believes to exist because not all jurors agree on its existence. *Mills* answers that question 'no.' It also makes clear that the question must be answered 'no' notwithstanding any procedural devices a state may employ to preclude the sentencer's consideration of mitigating factors at the ultimate decision-making stage. This means to me that North Carolina cannot preclude jurors from considering mitigating evidence at that stage by labeling the evidence legally irrelevant.

McKoy, 323 N.C. at 56, 372 S.E.2d at 46 (Exum, C.J. dissenting).

REASONS FOR GRANTING THE WRIT

Under North Carolina's capital sentencing procedure, jurors are expressly forbidden to give consideration to mitigating evidence unless all twelve jurors unanimously "find" the existence of mitigating circumstances relating to that evidence. Thus, a single holdout juror can preclude consideration of all mitigating evidence, even if eleven jurors believe that the evidence mandates sparing the defendant's life. This squarely violates this Court's decision in *Mills v. Maryland*, 486 U.S. ___ (1988).

This remains the procedure in North Carolina in spite of this Court's decision in *Mills*. It remains the procedure in spite of this Court's action in *Lloyd v. North Carolina*, ___ U.S. ___, No. 88-6833, (October 3, 1988), in which certiorari was granted, the judgment of the North Carolina Supreme Court was vacated, and the case was remanded to the state court for further consideration in light of *Mills*. Three days after this Court's disposition of *Lloyd*, and with full knowledge of this Court's action in *Lloyd*, the North Carolina Supreme Court affirmed a death sentence in another case raising the constitutionality of the unanimity requirement as to mitigating evidence, basing its decision on its opinion in the instant case. *State v. Allen*, No. 70A86, slip op. at 27 (A copy of the Court's opinion in *Allen* is attached as Appendix "C"). Indeed, subsequent to this Court's action in *Lloyd* the North

Carolina Supreme Court has affirmed four death sentences in addition to *Allen*. In each case the *Mills* defect was raised and rejected. *State v. Cummings*, No. 65A87, slip op. (October 6, 1988); *State v. Hunt*, No. 5A86, slip op. (November 3, 1988); *State v. Barnes*, No. 5A86, slip op. (November 3, 1988); *State v. Fullwood*, No. 37A86, slip op. (November 3, 1988). This issue is of fundamental importance to North Carolina's capital sentencing scheme, and the North Carolina Supreme Court appears to be intractable in declining to follow the straightforward dictates of this Court's Eighth Amendment jurisprudence. If North Carolina's unconstitutional practice is to be cured, apparently it will have to be done by this Court.

I. THE HOLDING OF MILLS V. MARYLAND APPLIES TO NORTH CAROLINA'S CAPITAL SENTENCING PROCEDURE

A. SUMMARY OF NORTH CAROLINA'S CAPITAL SENTENCING PROCEDURE

North Carolina's capital sentencing scheme requires the capital sentencing jury to deliberate on four questions before it can render a sentence of death. First, the jury must unanimously agree that the State has proved at least one aggravating circumstance beyond a reasonable doubt, and must deliberate as to each aggravating circumstance submitted to it by the court. Second, the jury must unanimously decide whether the defendant has unanimously proved by a preponderance of the evidence any of the mitigating circumstances submitted to it by the court. Third, the jury must unanimously determine beyond a reasonable doubt that the mitigating circumstances found to exist do not outweigh the aggravating circumstances found to exist. Finally, the jury must unanimously determine beyond a reasonable doubt that the aggravating circumstances found to exist are sufficiently substantial, when considered in light of the mitigating circumstances found to exist, to warrant the imposition of the death penalty. N.C. Gen. Stat. sec. 15A-2000; *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983).

B. MILLS'S APPLICATION TO NORTH CAROLINA

The instructions and verdict sheet were such that a reasonable juror in this case would have concluded that no piece of mitigating evidence proffered by McKoy could be considered in McKoy's favor in the sentencing decision unless it was first found by all twelve jurors to make out a mitigating circumstance. For that reason, Petitioner was sentenced in violation of *Mills*. One fact makes the issue here markedly simpler than in *Mills*. In North Carolina, it is the law that a capital sentencing jury must "unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." *State v. Kirkley*, 308 N.C. at 218, 302 S.E.2d at 157.

Examination of the instructions and issue sheet underscores the point. When the jurors in this case turned to the question of mitigating circumstances in Issue Two, this is what they saw:

> Issue Two: Do you *unanimously find* from the evidence the existence of one or more of the following mitigating circumstances?
>
> Answer: _____

> BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES, IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, **WRITE "YES", IF YOU UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE** BY A PREPONDERANCE OF THE EVIDENCE. **WRITE "NO", IF YOU DO NOT UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE** BY A PREPONDERANCE OF THE EVIDENCE.
>
> IF YOU WRITE "YES", IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE "YES", IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE "NO", IN ALL OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "NO", IN THE SPACE AFTER ISSUE TWO.
>
> 1. This murder was committed while Dock McKoy was under the influence of mental or emotional disturbance.
>
> Answer: _____
>
> 2. The capacity of Dock McKoy to apprecaite [sic] the criminality of his conduct or

to conform his conduct to the requirements of law was impaired.

Answer: _____

3. The age of Dock McKoy at the time of this murder is a mitigating circumstance.

Answer: _____

4. That for several decades Dock McKoy has exhibited signs of mental or emotional disturbance or defect that went untreated.

Answer: _____

5. That Dock McKoy has borderline intellectual functioning with a IQ score of 74.

Answer: _____

6. That Dock McKoy's mental and emotional disturbance is aggravated by his poor physical health.

Answer: _____

7. Dock McKoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

Answer: _____

8. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

Answer: _____

(Appendix "B", attached).

These directions are unambiguous. The jurors were to answer "yes" only if they unanimously agreed that a particular mitigating factor had been proved by a preponderance of the evidence. If they failed to unanimously agree that the circumstance existed, they were required to answer "no."

Having unanimously found two of eight mitigating circumstances to exist, the jury then turned its attention to Issue Three. Having done so, they saw the following:

Issue Three: Do you[3] **unanimously find** beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

Answer: _____

IF YOU ANSWER ISSUE THREE, "NO", INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES", PROCEED TO ISSUE FOUR.

(Appendix "B", attached).

"Under such circumstances, the lack of unanimity would have prevented the jury from marking that answer 'yes.' Regardless of whether the answer was marked 'no' or left blank, the instructions in Section III would prevent those jurors who thought [McKoy]'s [mental or emotion disturbance] was relevant to the ultimate sentencing decision from giving that mitigating circumstance any weight." *Mills*, 486 U.S. at ___, n.14.

Following the instructions at issue, McKoy's jury, after finding that the mitigating circumstances did not outweigh the aggravating circumstances, proceeded to Issue Four, which provided:

Issue Four: Do you **unanimously find** beyond a reasonable doubt that the aggravating circumstance or circumstances **found by you** is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances **found by you**.

Answer: _____

IF YOU ANSWER ISSUE FOUR, "NO", INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF

---

[3] The word "you" clearly is used in its plural form throughout the jury charge and is intended to be synonymous with "members of the jury." The singular usage is grammatically incompatible within the context of sentences such as, "If the evidence unanimously satisfies *you* that a mitigating circumstance exists, then *you* would find that mitigating circumstance." An individual juror cannot be unanimously satisfied about anything. Certainly it would be reasonable for a juror to assume, absent some indication to the contrary, that the pronoun was consistently intended to refer to the jury as a whole.

THIS FORM. IF YOU ANSWER ISSUE FOUR "YES", INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

(Appendix "B", attached).

If the jurors in this case remained true to their oaths and the words on the issue sheet--an assumption that has to be made--then the jurors were duty bound to consider only the mitigating evidence related to mitigating circumstances unanimously found by all twelve jurors. As in *Mills*, even a lone holdout could preclude other jurors from considering the evidence as a mitigating circumstance in the sentencing determination. That, *Mills* squarely holds, violates the doctrine of *Lockett v. Ohio* because "there is a substantial probability that reasonable jurors ... well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at ___, No. 87-5367, slip op. at 15.

Because it is impossible to conclude that no reasonable juror might read Issue Four as precluding the consideration of non-unanimous mitigating circumstances, the conclusion that *Mills* controls this case is unavoidable. Dock McKoy's death sentence accordingly is cruel and unusual punishment.

II. THE MCKOY COURT'S ATTEMPTS TO DISTINGUISH MILLS ARE UNAVAILING

A. THIS COURT'S DENIALS OF THE WRIT OF CERTIORARI CANNOT BE A BASIS FOR A STATE COURT TO IGNORE CONTROLLING CONSTITUTIONAL DOCTRINE

The *McKoy* opinion suggested that this Court implied something deeply revealing from its denials of the writ of certiorari in the cases of *Holden v. North Carolina, cert. denied*, 486 U.S. ___, No. 87-6674 (June 13, 1988) and *Gardner v. North Carolina, cert. denied*, 486 U.S. ___, No. 87-6196 (June 13, 1988). *McKoy*, 323 N.C. at 43, 372 S.E.2d at 35. To the extent that this Court in *Lloyd v. North*

Carolina, cert. granted, vacated and remanded, ___ U.S. ___, No. 88-6833 (1988) granted certiorari, vacated the judgment of the North Carolina Supreme Court, and remanded the case to the state court in light of *Mills*, such an inappropriate inference no longer deserves any weight. *See generally Vasquez v. United States*, 454 U.S. 975 (1981) (cited in Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th Ed. 1986) (denials of certiorari should be given no consideration because practical considerations make it impossible for the Court to explain its reasons for such denials)

Oddly, despite its reliance on this Court's denials of certiorari to affirm McKoy's death sentence, the North Carolina Supreme Court has given no weight at all to this Court's decision in *Lloyd*. Three days after this Court filed its order in *Lloyd*, and with full knowledge of this Court's action in *Lloyd*, the North Carolina Supreme Court decided another case which raised the question of the effect of *Mills--State v. Allen*, No. 70A86, slip op. (N.C. October 6, 1988). The response of the North Carolina Supreme Court to the *Lloyd* order was to reject Allen's *Mills* claim based on its earlier decision in *McKoy*, as though *Lloyd* had not occurred. *Allen, id.* at 27.

In dissent, Chief Justice Exum noted that the Petitioner in *Lloyd* had apprised this Court, by way of a supplemental brief, of the North Carolina Supreme Court's decision in *McKoy*; Chief Justice Exum concluded, therefore, that "[t]he *Lloyd* order, considered with the filings upon which it rests, render the conclusion reached in *McKoy*--that *Mills* has no application to North Carolina's unanimity jury instructions--far more untenable than it otherwise was." *Allen, id.* at 3 (Exum, C.J. dissenting).

B. A UNANIMITY REQUIREMENT WHICH PRECLUDES JURY CONSIDERATION OF MITIGATING EVIDENCE IS NO LESS UNCONSTITUTIONAL BECAUSE THE SENTENCER MAY IMPOSE A SENTENCE LESS THAN DEATH ON A BASIS OTHER THAN MITIGATING EVIDENCE

The majority opinion in *McKoy* noted a difference between North Carolina's capital sentencing scheme and the Maryland capital sentencing scheme at issue in *Mills*. Based on this difference, the *McKoy* court suggested that the *Mills* decision of this Court was "statute-specific." *McKoy*, 323 N.C. at 43, 372 S.E.2d at 35. The difference noted is that while Ralph Mills's jury was forced to impose the death sentence because it found factors in aggravation but none in mitigation, the identical process is not employed in North Carolina, even though the same result could occur.

First, this distinction misapprehends the holding of *Mills*. Though Ralph Mills's jury was required to impose the death penalty under Maryland law because it found factors in aggravation but none in mitigation, mandatoriness was not the concern expressed by the *Mills* Court. The *McKoy* opinion implies that this Court would have reached a different result had Mills's jury unanimously found a single mitigating factor. But, as Chief Justice Exum noted in dissent, a situation in which both aggravating and mitigating circumstances were found by the jury was considered by this Court in *Mills*, and resolved in Petitioner's favor. *McKoy*, 323 N.C. at 54, 372 S.E.2d at 44-45, (Exum, C.J. dissenting), *citing Mills*, 486 U.S. at ___, slip op. at 12, n.14.

Rather, the Court focused on the unanimity requirement before jurors could consider mitigating evidence in the ultimate determination as to whether or not the defendant should be sentenced to death. As the *Mills* Court noted, "it would certainly be the height of arbitrariness **to allow** or require the imposition of the death penalty" where a single juror may preclude the consideration of mitigation by other jurors. *Mills*, 486 U.S. ___, ___, slip op. at 6 (emphasis added). Even if the sentencer is free to return a sentence less than death on some basis other than

mitigation, before a person may be constitutionally sentenced to death, the sentencer must consider all relevant evidence in mitigation. *Mills*, *id*.

Additionally, in spite of the fourth question as to the sufficiency of the factors found in aggravation, North Carolina juries do not have the option of recommending a life sentence notwithstanding the outcome of their deliberations on specific aggravating or mitigating factors. Rather, once a North Carolina jury has concluded that aggravating circumstances are not outweighed by mitigating circumstances, and that the aggravating circumstances unanimously found, when considered with the mitigating circumstances unanimously found, are sufficiently substantial to warrant the imposition of the death penalty, that jury is instructed that it must recommend the death sentence. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 569, *cert. denied*, 459 U.S. 1056 (1982). In short, North Carolina juries are permitted to give no more consideration to mitigating evidence than did Ralph Mills's jury.

C. MITIGATING FACTORS RELATED TO THE CHARACTER AND RECORD OF THE DEFENDANT, OR TO THE CIRCUMSTANCES OF THE OFFENSE, MAY NOT BE PRECLUDED FROM CONSIDERATION AT THE PENALTY PHASE OF A CAPITAL MURDER TRIAL BY CALLING THEM "IRRELEVANT" WHEN NOT UNANIMOUSLY FOUND TO EXIST

The majority opinion in *McKoy* seized upon a footnote in this Court's opinion in *Mills* to suggest a distinction between Maryland's capital sentencing procedure and North Carolina's which it said might render *Mills* inapplicable to North Carolina. *McKoy*, 323 N.C. at 41, 372 S.E.2d at 34. After reiterating the doctrine enunciated in *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court in *Mills* explained in a footnote that neither party argued, "nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered legally 'irrelevant' by one holdout vote." *Mills*, 486 U.S. at ___, n.7, slip op. at 6, n.7.

The *McKoy* majority held that mitigating evidence **ceases to be legally relevant if it is not unanimously found by the jury**, and subsequently has no further

role in the sentencing scheme. *McKoy*, 323 N.C. at 40-41, 372 S.E.2d at 33-34. Under North Carolina law, the unanimity requirement is a device by which the jury determines what evidence is legally relevant, a device by which a single holdout vote can render mitigating evidence irrelevant.[4]

This new approach, erecting an obstacle to preclude the consideration of mitigating evidence under the guise of a state law relevancy determination, has already twice failed to pass constitutional muster. *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982). Were states to be able to circumvent the *Lockett* doctrine merely by characterizing proffered mitigating evidence as "irrelevant", the *Lockett* doctrine would be effectively obliterated.

The flaws in the Court's opinion in *McKoy* did not go unnoticed. In dissent, Chief Justice Exum lamented the "relevancy" holding of the *McKoy* majority, writing that

> "[w]hether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. [. . .] To say, as the majority does here, that jury unanimity on a mitigating factor is necessary to make that factor legally relevant in the final balancing process seems not only to be a misuse of the concept of relevancy but also a classical case of circular reasoning with regard to the constitutional question presented."

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[4] This is a novel construction of state law. In previously upholding the unanimity requirement, the North Carolina Supreme Court had held that the Eighth Amendment is satisfied by merely allowing jurors to consider mitigating evidence when deciding whether a mitigating circumstance exists. *State v. Kirkley*, 308 N.C. 196, 219, 302 S.E.2d 144, 156-57 (1983). This is in accord with the North Carolina Supreme Court's holding that our capital sentencing scheme provides, "in conformity with the constitutional mandates of the Eighth and Fourteenth Amendments, that any evidence may be presented at the separate sentencing hearing **which the court deems** 'relevant to sentence' or 'to have probative value,' including matters related to aggravating or mitigating circumstances." *State v. Pinch*, 306 N.C. 1, 19, 292 S.E.2d 203, 219 (1982) (citations omitted) (emphasis in original).

Until *McKoy*, the law in North Carolina was clear that "[t]he competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury." 1 H. Brandis on NORTH CAROLINA EVIDENCE, sec. 8, n.7 (3rd ed. 1988), *citing Queen City Coach Co. v. Lee*, 218 N.C. 320, 11 S.E.2d 341 (1940). *See, generally*, N.C. R. EVID. 103(c), 402. In North Carolina, capital defendants bear a burden of proving by a preponderance that mitigating evidence should be given credibility, probative force, and weight. *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980).

McKoy, 323 N.C. at 56, 372 S.E.2d at 45 (Exum, C.J. dissenting).

Moreover, the Eighth Amendment is not satisfied merely by permitting consideration of mitigating evidence in determining whether mitigating circumstances exist. As Chief Justice Exum noted in dissent, "[t]here is no question that all jurors were permitted to consider such evidence at that [earlier] stage of the process in *Mills*." *McKoy*, 323 N.C. at 56, 372 S.E.2d at 46.

The footnote in *Mills* upon which the North Carolina Supreme Court places such great reliance, *Mills v. Maryland*, 486 U.S. ___, ___, n.7, provides no support for avoiding the application of *Mills*. A single holdout juror may not render mitigating evidence legally irrelevant as a matter of constitutional law. *Mills*, 486 U.S. at ___, slip op. at 7. Even assuming there is some method by which the states may define the relevance of mitigation,[5] it is clear they may not do so by means of a unanimity requirement. As this Court stated in *Mills*,

> "it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by the sentencing court, or by an evidentiary ruling. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, . . . the conclusion would necessarily be the same: 'Because the sentencer's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.'" *Mills*, 486 U.S. at ___, slip op. at 7 (citations omitted).

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[5] The *McKoy* Court's conclusion that the consideration of mitigating evidence may be constitutionally precluded erroneously relied on this Court's decision in *Franklin v. Lynaugh*, 486 U.S. ___ (1988). However, the question presented and discussed in *Franklin* provides no support for North Carolina's interpretation because the Texas scheme at issue does not preclude all consideration of mitigating evidence; rather, it narrows the function of mitigation. The claim presented in *Franklin*, and again in *Penry v. Lynaugh*, *cert. granted*, ___ U.S. ___ (1988) is whether, as a matter of constitutional law, a state may channel the jury's ability to give effect to evidence related to the character and background of the defendant which does not apply as a mitigating factor to any of Texas' three special sentencing questions. Under Texas law, jurors are not precluded from considering mitigating evidence that has been presented; rather, their consideration of the mitigating evidence must be filtered through these statutory questions.

The line of cases which enunciate the Eighth Amendment jurisprudence as to mitigating evidence and individualized sentencing considerations in death penalty cases has uniformly defined "relevance" as that term relates to mitigating evidence as any evidence related to the defendant's character or record, or to the circumstances of the offense, that the defendant proffers as a basis for a sentence less than death. *See Woodson v. North Carolina*, 428 U.S. 280, 303 (1976); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *Green v. Georgia*, 442 U.S. 95, 97 (1979); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 6 (1986); *California v. Brown*, 479 U.S. ___, ___ (1987) (O'Connor, J. concurring); *Mills v. Maryland*, 486 U.S. ___, ___ (1988); *Franklin v. Lynaugh*, 486 U.S. ___ (1988) (O'Connor, J. concurring).

In the instant case, the jury failed to reach unanimous agreement as to the existence of six of the eight mitigating circumstances submitted to them. Under North Carolina law, that outcome precluded any juror from giving weight to or otherwise considering the evidence underlying those circumstances in deciding whether defendant should live or die.

The evidence at issue was critically important to defendant's case for a sentence less than death. For example, two state employed forensic psychiatrists presented extensive and uncontradicted testimony that defendant was suffering from severe and longstanding psychological disorders at the time he fired the fatal shot. That evidence is ". . . relevant because of the belief that defendants who commit criminal acts that are attributable to . . . emotional and mental problems may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. ___, ___ (O'Connor, J. concurring). That same evidence was rendered "irrelevant", however, because the jury failed to reach unanimity as to the statutory circumstance that the murder was committed while the defendant was under the influence of mental or emotional disturbance. N.C.Gen. Stat. sec. 15A-2000(f)(2).

As interpreted by the North Carolina Supreme Court in *McKoy*, the North Carolina capital sentencing scheme renders as irrelevant mitigating evidence not

unanimously found by the jury and precludes such evidence from consideration at the penalty phase of a capital murder trial. For that reason it is unconstitutional. *Mills v. Maryland*, 486 U.S. ___ (1988).

CONCLUSION

Therefore, the Petitioner respectfully requests that this Court grant the petition, issue the writ of certiorari, and summarily reverse the sentence of death in light of *Mills v. Maryland*, 486 U.S. ___ (1988). Alternatively, the Petitioner respectfully requests that this Court grant the Petition, vacate the North Carolina Supreme Court decision as to Petitioner's sentence, and remand the case to the North Carolina Supreme Court for further consideration in light of *Lloyd v. North Carolina*, 486 U.S. ___ (1988).

Respectfully submitted,

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APPENDIX "A"

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. DOCK McKOY, JR., a/k/a DOCK McCOY, a/k/a DOCK McKAY, a/k/a PAUL McCOY

No. 585A85

(Filed 7 September 1988) ✓

1. **Criminal Law §§ 102.13, 128.1— capital case—comments by trial court and prosecutor on appellate review**

The trial court's statement during a routine explanation of the court reporter's duties that "the Supreme Court can review" this case, and the prosecutor's jury argument that defendant, if convicted, can appeal questions of law but not the jury's findings of fact, could not reasonably be construed to diminish the jury's responsibility for its decisions and thus did not fatally undermine the jury's verdict of guilty of first degree murder and its conclusion that death is the appropriate punishment.

2. **Jury § 6.3— voir dire of prospective jurors—sympathy toward intoxicated defendant**

The trial court did not abuse its discretion by failing *ex mero motu* to prohibit the prosecutor in a first degree murder case from asking several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense, since the questions did not tend to "stake out" the jurors as to their potential verdict or how they would vote under a given state of facts but were properly allowed in the exercise of the prosecutor's right to secure an unbiased jury.

3. **Criminal Law § 75.10— refusal to sign written waiver of rights—oral waiver**

The trial court's finding that defendant made an express waiver of his rights before interrogation was supported by an S.B.I. agent's testimony that defendant refused to sign a written waiver because he could not see it but stated that he understood his rights and agreed to talk with the officers.

4. **Criminal Law § 75.5— no expressed desire to terminate interview—supporting evidence**

The trial court's finding that defendant never expressed a desire to terminate an interview was supported by an S.B.I. agent's testimony that defendant asked to take a break because he was tired and that defendant subsequently agreed to resume the conversation.

5. **Criminal Law § 75— voluntariness of confession and waiver of rights—totality of circumstances—necessity for police coercion**

The appellate court will look to the totality of circumstances in determining the voluntariness of a confession and the waiver of *Miranda* rights. However, police coercion is a necessary predicate to a determination that a waiver or statement was not given voluntarily within the meaning of the due process clause of the Fourth Amendment.

6. **Criminal Law § 75.10— voluntariness of waiver of rights and confession—previous convictions**

A finding that defendant had previously been convicted of two felonies and that he told an officer that, because of this experience, he understood "all that stuff" (*i.e.*, his rights) supported the conclusion that defendant's waiver of his rights and his confession were voluntary.

7. **Criminal Law § 75.15— voluntariness of confession—mild intoxication**

The fact that defendant may have experienced some lingering, mild intoxication at the time of his confession does not preclude the conclusion that he confessed voluntarily. Rather, defendant's intoxication was relevant to his credibility, which was a question for the jury.

8. **Criminal Law § 75.14— low I.Q.—voluntariness of confession**

Although a psychiatrist testified that defendant's I.Q. placed him in the borderline range of intellectual functioning, the evidence permitted a conclusion that defendant had sufficient mental capacity to waive his rights and voluntarily confess where it showed that defendant spoke rationally during his extensive conversation with officers; he held a job prior to the shooting in question and was described by his supervisor as a good worker; and he had the mental capacity to testify at trial.

9. **Criminal Law § 75.14— mental disorders—voluntariness of confession—conflicting psychiatric and lay testimony**

A psychiatrist's testimony that defendant's mental disorders would prevent him from making a truly voluntary confession did not preclude a conclusion that defendant's mental disorders did not prevent his making a voluntary confession where an S.B.I. agent, who had ample opportunity to observe defendant at the time he waived his rights and confessed, gave substantial testimony indicating that defendant was able to comprehend his discussion with law officers.

10. **Criminal Law § 75.10— voluntariness of waiver of rights and confession—totality of circumstances**

The totality of the circumstances permitted the trial court's conclusion that defendant knowingly, intelligently, and voluntarily waived his *Miranda*

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rights and that his in-custody statements were made freely, understandingly, and voluntarily.

11. Criminal Law § 102.7 — jury argument concerning psychiatrist — absence of prejudice

The trial court did not abuse its discretion in overruling defendant's objection to the prosecutor's potentially misleading jury argument in a first degree murder case that "if the law recognized them [psychiatrists] as the experts on what the condition of somebody's mind was, you wouldn't be hearing the case" where the prosecutor went on to state correctly that the law permits hearing from the experts and considering what they have to say, and he then urged the jurors to consider not only the expert testimony but also that of the other witnesses.

12. Criminal Law § 102.6 — jury argument — competency to stand trial as evidence of sanity

The trial court did not abuse its discretion in overruling defendant's objection to the prosecutor's jury argument suggesting that the fact that defendant was competent to stand trial indicated that his sanity defense lacked merit since the argument did not misstate the law but in effect urged the jury to consider evidence of defendant's state of mind at the time of trial in passing upon his state of mind at the time of the crime, and since the trial court gave clear and correct instructions on insanity.

13. Criminal Law § 102.6 — jury argument — misstatement of law as one interpretation — objection sustained

The trial court did not abuse its discretion in sustaining the State's objection to defense counsel's jury argument that, in order to convict defendant of first degree murder, the jury would have to find that a psychiatrist who testified that defendant lacked the mental capacity to premeditate and deliberate at the time of the crime "was wrong about it beyond a reasonable doubt," since the argument could have been interpreted as stating the correct proposition that the State bore the burden of proving beyond a reasonable doubt the premeditation and deliberation element of first degree murder or as incorrectly implying that the State bore the burden of proving the insanity defense. Assuming error, defendant failed to carry his burden of showing prejudice where the trial court's charge correctly and unambiguously emphasized the State's burden of proving premeditation and deliberation beyond a reasonable doubt.

14. Criminal Law § 135.9 — emotional disturbance mitigating circumstance — jury's failure to find — defendant's expert testimony not uncontradicted or inherently credible

The testimony of defendant's two psychiatric experts that defendant was suffering from significant psychological disorders at the time of a shooting was neither uncontradicted nor inherently credible so as to make the sentencing determination unreliable because of the jury's failure to find the statutory mitigating circumstance that "defendant was under the influence of mental or emotional disturbance" where the testimony of other witnesses regarding defendant's mental and emotional state at the time of the shooting conflicted

with that of defendant's experts, and where neither of defendant's experts examined him until several weeks or months after the crime. N.C.G.S. § 15A-2000(b)(2) (1988); Eighth and Fourteenth Amendments to the U. S. Constitution.

15. Criminal Law § 102.6 — jury argument — commitment not to sympathize with intoxicated defendant

The trial court in a first degree murder case did not abuse its discretion by failing to intervene ex mero motu when the district attorney reminded the jurors during his closing argument of their commitments not to have sympathy for defendant because he was intoxicated.

16. Criminal Law § 135.9 — capital sentencing procedure — mitigating circumstances — requirement of jury unanimity — constitutionality

The trial court's sentencing instructions in a first degree murder case were not erroneous and unconstitutional under the decision of *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 because they required jury unanimity on the existence of a mitigating circumstance before that circumstance could be considered for the purpose of sentencing.

17. Criminal Law § 135.4 — capital sentencing procedure — individualized sentencing and guided sentencer discretion — constitutionality

The North Carolina capital sentencing procedure allows for individualized sentencing by (1) allowing the jury to find circumstances in mitigation, both submitted circumstances and any other circumstances the jury deems to have mitigating value, (2) allowing the jury to consider all relevant evidence in deciding whether to recommend a sentence of death, and (3) requiring the jury, before recommending that defendant be sentenced to death, to weigh the "found" aggravating and "found" mitigating circumstances and to decide whether the "found" aggravating circumstances, considered with the "found" mitigating circumstances, are sufficiently substantial to call for the death penalty. The capital sentencing procedure also guides the jury's discretion so as to guard against the arbitrary and capricious infliction of the death penalty by (1) requiring the State to prove the existence of an aggravating circumstance beyond a reasonable doubt, (2) requiring the defendant to prove the existence of a mitigating circumstance by a preponderance of the evidence, and (3) then allowing the jury to consider only that evidence which is relevant, i.e., the evidence which the jury had unanimously "found," in sentencing the defendant. The capital sentencing procedure thus provides a proper balance between individualized sentencing and guided discretion in conformity with federal constitutional requirements.

18. Criminal Law § 135.5 — capital case — aggravating factors relied on — no right to disclosure

The trial court in a capital case did not err in denying defendant's motion to require the State to disclose potential aggravating circumstances it intended to rely upon at sentencing.

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...ge did not err in denying defendant's motion ...ential aggravating circumstances it intend...

19. Criminal Law § 138.9— capital case—mitigating circumstances—burden of proof

The trial court in a capital case did not err in placing the burden of proving the *ex mero* of mitigating circumstances on defendant rather than on the State.

20. Criminal Law § 138.7— capital case—affirmative answer to issue four—death penalty required

The trial court did not err in instructing the jury in a capital case that it must recommend a death sentence if it answered issue four affirmatively.

21. Criminal Law § 138.2— prior violent felony aggravating circumstance—constitutionality

The aggravating circumstance that defendant had a prior conviction of a felony involving the use or threat of violence to the person is not unconstitutionally vague and overbroad either facially or as applied in this case.

22. Criminal Law § 138.10— first degree murder—death penalty not disproportionate

A sentence of death imposed upon defendant for first degree murder was not disproportionate or excessive, considering both the crime and the defendant, where the crime was committed against a law officer while he was engaged in his official duties; the killing followed a considerable period during which law officers and a neighbor attempted to persuade defendant to stop randomly shooting his gun and after defendant told the officer to "leave or I'll kill you"; and the jury found that defendant had previously been convicted of a felony involving the use of violence to the person in that he had pled guilty to second degree murder.

Chief Justice Exum *dissenting.*

Justice Frye *joins in this dissenting opinion.*

Justice Frye *dissenting.*

Chief Justice Exum *joins in this dissenting opinion.*

Justice Martin *dissenting in part.*

Chief Justice Exum *and Justice* Frye *join in this dissenting opinion.*

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by *Freeman, J.*, at the 29 July 1985 session of Superior Court, STANLY County. Heard in the Supreme Court 14 March 1988; additional arguments heard 22 August 1988.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State (original brief and argument); Lacy H. Thornburg, Attorney General, James J. Coman, Senior Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, Steven F. Bryant, Assistant Attorney General, and Barry S. McNeill, Assistant Attorney General, for the State (supplemental brief and argument).

Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant (original brief and argument); Malcolm Ray Hunter, Jr., Appellate Defender, and Louis D. Bilionis, for defendant-appellant (supplemental brief and argument).

E. Ann Christian and Robert E. Zaytoun for North Carolina Academy of Trial Lawyers, amicus curiae.

John A. Dusenbury, Jr., for North Carolina Association of Black Lawyers, amicus curiae.

WHICHARD, Justice.

Defendant was convicted of the first degree murder of Deputy William Kress Horne of the Anson County Sheriff's Department. The jury found as aggravating circumstances that defendant previously had been convicted of a felony involving violence and that the murder was committed against a deputy sheriff while engaged in the performance of official duties. It found as mitigating circumstances that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired and that defendant has borderline intellectual functioning.

The jury recommended the death penalty, and the trial court sentenced accordingly. We find no error.

Haywood Haskell lived beside defendant outside of Wadesboro. On 22 December 1984, Haskell was working on his wife's car. He observed defendant fire two shots into the air. Haskell suggested that defendant's shooting could endanger the neighborhood children, but defendant responded that "everybody else is shooting" and "well, it's Christmas."

y General, by Steven F. Bryant, r the State foriginal brief and Attorney General, James J. Co- General, William N. Farrell, Jr., l, Joan H. Byers, Special Deputy ant, Assistant Attorney General, Attorney General, for the State ll).

ppellate Defender, by David W. fender, for defendant-appellant lcolm Ray Hunter, Jr., Appellate for defendant-appellant (supple-

t E. Zaytoun for North Carolina us curiae.

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de defendant outside of Wades- skell was working on his wife's two shots into the air. Haskell ing could endanger the neighbor- sponded that "everybody else is as."

Haskell telephoned the Anson County Sheriff's Department, and Deputy Calvin Lambert responded. After discussing the situation with Haskell, Lambert walked onto defendant's porch and attempted to talk with him. Lambert asked defendant to step out onto the porch, but defendant remained inside. Lambert told defendant not to shot his gun because he was drunk and might hurt someone. He then returned to his car and observed defendant's home for several minutes before leaving the area.

Later, Haskell saw defendant lying in front of his outhouse. Because defendant could not stand unaided, a neighbor helped him to his house. Defendant had locked himself out, and the neighbor helped him gain entry by prying open a window. A few minutes later defendant hailed Duke Cox, a neighborhood teenager, and asked Cox to help him fix the window. Cox attempted to help, but he soon left because defendant refused to provide a hammer. When Cox walked away, defendant accused him of stealing some money and fired three shots in his direction.

Prompted by this incident, Haskell again called the sheriff's department. Deputies Robert Usery and Kress Horne responded. They asked defendant to come outside; defendant responded by threatening to kill them if they did not leave. More officers arrived, and Usery decided to investigate in back of defendant's house while Horne stood behind the patrol car and continued to talk to defendant. While Usery circled behind defendant's house, Horne drew his revolver and braced himself across the patrol car. Defendant pushed open his screen door and fired one shot that hit Horne in the face. Horne later died from the resultant injuries.

The other officers surrounded the house, and Usery advised defendant that he would use tear gas if defendant did not come out. Hearing no response, Usery threw a tear gas canister into the house. After defendant fired two shots, the officers returned a short burst of fire. Defendant then walked out, and the officers took him into custody. Because defendant was bleeding from two wounds, the officers transported him to the Anson County Hospital.

There, Dr. Merceda Perry examined defendant. Perry found two bullet wounds, and he noticed a strong odor of alcohol. He treated a puncture wound on defendant's buttocks and a deep laceration on his forehead, which he closed with sutures. Initially,

Perry found that defendant responded incoherently to his questions. At approximately 6:30 p.m., Perry ordered a blood alcohol test which indicated that defendant's blood alcohol level was equivalent to a .26 reading on the breathalyzer scale. Although defendant remained intoxicated, he had become more coherent by 7:20 p.m., the last time Perry saw him. In Perry's opinion, defendant would have become more coherent still by 8:30 p.m. At 8:15 p.m., Perry released defendant into the custody of S.B.I. Agent Carl Jackson for delivery to Central Prison in Raleigh.

Jackson and two deputy sheriffs placed defendant in a van and drove him to the sheriff's department, where warrants were served on him. They then drove toward Raleigh. When defendant complained that he was thirsty, the officers purchased two soft drinks, which defendant consumed. Jackson read defendant his rights, and defendant orally agreed to waive them. Defendant refused to sign a written waiver because his head injury prevented him from seeing the waiver form. Defendant made several statements during the trip admitting that he killed Deputy Horne because Horne "pressured" him.

GUILT PHASE

[1] Defendant contends that the jury's verdict of guilt, and its conclusion that death is the appropriate punishment, are "fatally undermined" by the fact that both the trial court and the prosecutor informed the jury that the trial was subject to appellate review. The factual basis of the argument is as follows:

First, at the outset of the trial the court identified the court reporter to the jurors and explained:

> The lady right down here in front of me in the blue dress is Melody Courtney. She's a court reporter. She will be taking down everything that's said or done during the trial so that everything is a matter of public record and then she can type up a transcript of a trial and they mail it down to the Supreme Court and the Supreme Court can review what we're doing up here in Stanly County.

Defendant did not object to this statement, and the court continued its general explanation of the duties of various court personnel.

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Second, in his closing guilt-phase argument, the prosecutor stated the following:

> And you may say, well, what is our role? Now, the Judge will tell you what your role as a trial juror happens to be. As we understand your role, you are the finders of fact, simply that. You don't decide what the law is. You don't interpret the law. The law is given to you by the Judge and he tells you what the meaning of that law is, and he will tell you how you—he will tell you how to apply that law which he gives to you to the facts that you have found from the sworn testimony.
>
> The jury is simply a fact—a body that finds facts. That's all you're here for. There is no appeal in your finding of facts. There is a right of appeal to any interpretation of laws and application of laws which are present in this case. The defendant, if convicted, as we say he certainly should be from the evidence and under the law, he can appeal on points of law,—
>
> MR. STOKES: OBJECTION.
>
> MR. LOWDER: —questions of law,—
>
> THE COURT: OVERRULED.
>
> MR. LOWDER: —but he cannot appeal from your findings of fact.

The legal basis of defendant's argument is grounded, essentially, in this Court's decisions in *State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975), and *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979), and in the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed. 2d 231 (1985). The pertinent aspects of these cases are as follows:

In *White*, the prosecutor argued:

> "[Y]ou will answer the question whether this defendant is guilty of first degree murder. If found guilty, he gets an automatic appeal to the Supreme Court of North Carolina—it is necessary. If any error is made in this court, that Court will say."

White, 286 N.C. at 402, 211 S.E. 2d at 449. The trial court sustained defendant's objection and instructed the jury: "[D]on't consider what he said about the Supreme Court." Later, as it began its charge, the court gave the following instruction:

> "I want to go back to the argument that was objected to in the argument of counsel that the Supreme Court has a right to send this case back on mistakes. The reason I sustained that objection, I want you all to understand is that the Supreme Court will review this case. That they would only send the case back if I make a mistake on a legal question. They will not review the decisions of the facts by the jury. The jury is the sole trier of the facts of this lawsuit."

Id. at 402-03, 211 S.E. 2d at 449. We explained that an argument suggesting that the jury can "depend upon either judicial or executive review to correct any errors in their verdict, and to share their responsibility for it, is an abuse of privilege and prejudicial to the defendant." *Id.* at 403, 211 S.E. 2d at 450. The prosecutor's argument, we said, "was clearly intended to overcome the jurors' natural reluctance to render a verdict of guilty of murder in the first degree by diluting their responsibility for its consequences." *Id.* at 404, 211 S.E. 2d at 450. While the court accurately stated that this Court will only review questions of law, the instructions were nonetheless held inadequate to cure the impropriety because they "did not fully enlighten the jury as to the nature of the Supreme Court's review of a case on appeal and as to the difference between 'triers of the facts' and judges of the law." *Id.* Moreover, we said, the jury probably understood the statement that "the Supreme Court will review this case" to mean that the trial court assumed that there would be a guilty verdict. *Id.* at 404, 211 S.E. 2d at 450-51. For these reasons, we granted the defendant a new trial. *Id.* at 404, 211 S.E. 2d at 451.

In *Jones*, the prosecutor argued: "[I]f you do err in this case he [defendant] has the right of appeal." *Jones*, 296 N.C. at 497, 251 S.E. 2d at 427. Because an appellate court will not review the factfinder's verdict in the guilt phase, we observed that the prosecutor had made an inaccurate statement. Moreover, the argument's "overriding vice" was that it "effectively told the jurors that they could rely upon the Supreme Court to correct their verdict if it were wrongful or improper . . . ." *Id.* at 500, 251 S.E. 2d

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at 428. We held that the argument could have caused the jury to believe that this Court would share its burden of reaching a verdict, and we thus granted defendant's request for a new trial. *Id.*

In *Caldwell*, the prosecutor argued to the jury: "[Y]our decision is not the final decision. . . . Your job is reviewable." *Caldwell*, 472 U.S. at 325, 86 L.Ed. 2d at 237. In addition, the trial court stated that the jury's decision would be "reviewable automatically as the death penalty commands." *Id.* The United States Supreme Court vacated defendant's death sentence, stating that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 86 L.Ed. 2d at 239.

These cases stand for the proposition that statements by the trial court or prosecutor that tend to dilute the jury's sense of responsibility for its determinations by suggesting that its verdict will be reviewed, or that the punishment imposed will be withheld, are impermissible and prejudicial. *See* 75 Am. Jur. 2d *Trial* § 230 (1974) ("[c]omments . . . on the power of the court to suspend sentence or to set the jury's verdict aside, or statements that a higher court has the power to review the finding of the jury on the weight of the evidence, are calculated to induce the jury to disregard their responsibility, and are improper."). That proposition is not implicated, however, by the facts here, which are distinguishable from those in the above cases.

In *White*, the prosecutor told the jury that "[if] any error is made *in this court*, [the Supreme] Court will say." *White*, 296 N.C. at 402, 211 S.E. 2d at 449 (emphasis added). The jury clearly could have interpreted the phrase "in this court" to include its errors as well as the court's errors. Here, by contrast, the prosecutor clearly stated that defendant could not appeal from the jury's findings of fact.

Further, in *White* the court stated to the jury that "the Supreme Court *will* review this case." *Id.* at 402, 211 S.E. 2d at 449 (emphasis added). This Court concluded that by that "positive statement . . . the jury was bound to have understood that the court assumed [that] their verdict would be guilty." *Id.* at 404, 211 S.E. 2d at 450-51. Here, by contrast, the court only noted the possibility of appeal by stating—in the context of a routine explanation of the court reporter's duties—that "the Supreme Court can review" this case. (Emphasis added.) This statement implies no assumption of guilt and only conveys information commonly known. We conclude that this brief comment—at the outset of the trial and in the context of an explanation of the court reporter's duties—could not have influenced, adversely to defendant, the jury's perception of its responsibility for its decisions.

Likewise, in *Jones*, the prosecutor argued to the jury: "[I]f you do err in this case he [defendant] has the right of appeal." *Jones*, 296 N.C. at 497, 251 S.E. 2d at 427 (emphasis added). Here, as noted above, the prosecutor instead clearly stated that defendant could not appeal from the jury's findings of fact. The challenged argument was simply an explanation of the jury's function and of the application of the law to the facts.

Finally, in *Caldwell* the prosecutor argued to the jury: "[Y]our decision is not the final decision. . . . Your job is reviewable. . . . [T]he decision you render is automatically reviewable by the Supreme Court." *Caldwell*, 472 U.S. at 325-26, 86 L.Ed. 2d at 237. As noted above, the United States Supreme Court vacated the death sentence on the ground that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29, 86 L.Ed. 2d at 239. It stated: "[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333, 86 L.Ed. 2d at 242.

Again, unlike in *Caldwell*, the prosecutor here did not argue that the jury's determination of defendant's guilt and punishment was not final. Instead, he clearly informed the jury that there was no appeal from its findings of fact. The risk condemned in *Caldwell*, *viz*, "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court," *id.* at 330, 86 L.Ed. 2d at 240, thus is not present here.

For the foregoing reasons, we do not find *White*, *Jones*, and *Caldwell* controlling. Instead, we conclude that this case is more

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like *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977). The trial court in *Finch* remarked: "[T]ake what the court says about the law, and what it is in the case. *If the Court is wrong, then the Court of Appeals will let that be known. Somebody will straighten that out, but you take your instructions from the Court.*" *Id.* at 135, 235 S.E. 2d at 821 (emphasis in original). We held that these statements did not suggest that the verdict would be reviewed or that the mandated punishment would be withheld; they simply informed the jury that the law, as stated by the trial court, could be reviewed. *Id.* at 137, 235 S.E. 2d at 822.

Here, as in *Finch*, nothing in the statements by the court or the prosecutor could reasonably be construed to diminish the jury's responsibility for its decisions. The trial court only informed the jury that this Court "can review" the case. (Emphasis added.) "Mere reference to the process of appellate review does not invalidate a death sentence." *Mazzan v. State*, 733 P. 2d 850, 851 (Nev. 1987). Viewed in context, the prosecutor's argument stressed the jury's role as the final factfinder rather than diluting its sense of responsibility for its verdict. *See id.* at 851 ("argument did not shift responsibility to the appellate court, but rather heightened the sentencing jury's awareness of the gravity of its task"); *Riley v. State*, 496 A. 2d 997, 1025 (Del. 1985), *cert. denied*, 478 U.S. 1022, 92 L.Ed. 2d 743 (1986) ("In no sense may it reasonably be said that the prosecutor was either misstating the law, misleading the jury as to its role, or minimizing its sentencing responsibility."). We thus conclude that the trial court did not abuse its discretion by allowing the argument. *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E. 2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985). These assignments of error are overruled.

[2] Defendant next contends that the trial court erred by allowing the prosecutor, during voir dire, to "stake out" the jurors by obtaining commitments from them to disregard defendant's intoxication in determining the existence of premeditation and deliberation and to reject his voluntary intoxication defense. Defendant failed to object to the prosecutor's questions at trial. Ordinarily, such failure constitutes a waiver of the right to assert the alleged error on appeal. *State v. Oliver*, 309 N.C. 326, 334, 307 S.E. 2d 304, 311 (1983). However, in light of our practice of scrupulous review in death sentence cases "to the end [that] it

may affirmatively appear that all proper safeguards" have been afforded the defendant, *State v. Whitley*, 288 N.C. 106, 108, 215 S.E. 2d 568, 570 (1975) (quoting *State v. Fowler*, 270 N.C. 468, 469, 155 S.E. 2d 83, 84 (1967)), we elect to review the issue.

The prosecutor asked several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. The questions varied slightly, but the thrust of each was:

> If it is shown to you from the evidence and beyond a reasonable doubt that defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to [a]ffect your verdict?

Each juror responded negatively to the question.

Counsel is allowed wide latitude in examining jurors on voir dire; regulation of the form of the questions lies within the trial court's discretion. *State v. Vinson*, 287 N.C. 326, 336, 215 S.E. 2d 60, 68 (1975), *modified as to death penalty*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976). A defendant seeking to establish reversible error must demonstrate prejudice as well as a clear abuse of that discretion. *State v. Avery*, 315 N.C. 1, 20, 337 S.E. 2d 786, 797 (1985).

In *Vinson*, we explained:

> [H]ypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. . . . The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.
>
> Types of questions which have been considered improper include "those asking a juror what his verdict would be if the evidence were evenly balanced; if he had a reasonable doubt of a defendant's guilt; if he were convinced beyond a reasonable doubt of a defendant's guilt; or questions asking him

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whether he would, in a specified hypothetical situation, vote in favor of the death penalty. . . ."

Vinson, 287 N.C. at 336-37, 215 S.E. 2d at 66 (citations omitted); *accord State v. Avery*, 315 N.C. at 20, 337 S.E. 2d at 797.

The questions here were properly allowed as an inquiry into the jurors' sympathies toward an intoxicated person. They did not contain incorrect or inadequate statements of law, nor were they ambiguous or confusing. Moreover, they did not tend to "stake out" the jurors as to their potential verdict or how they would vote under a given state of facts. The questions did not "fish for answers to legal questions before the judge ha[d] instructed the jury." *State v. Clark*, 319 N.C. 215, 221, 353 S.E. 2d 205, 208 (1987).

Addressing the propriety of similar questions, our Court of Appeals has upheld the State's questioning prospective jurors as to whether they could be fair and impartial in a case involving a proposed sale of marijuana. *State v. Williams*, 41 N.C. App. 287, 254 S.E. 2d 649, *disc. rev. denied*, 297 N.C. 699, 259 S.E. 2d 297 (1979). It held that the State's questions tended only to "secure impartial jurors," while not causing them to commit to a future course of action. *Id.* at 291-92, 254 S.E. 2d at 653.

As in *Williams*, the prosecutor here was simply inquiring into the sympathies of prospective jurors in the exercise of his right to secure an unbiased jury. *See State v. Lee*, 292 N.C. 617, 621, 234 S.E. 2d 574, 577 (1977) (State entitled to unbiased jury; primary purpose of voir dire is to secure such). A promise not to sympathize with a defendant because of his intoxication is not the equivalent of a commitment to ignore the effect of intoxication in the resolution of legal issues. The questions and responses did not "stake out" the jurors to disregard the trial court's instructions on the effect of intoxication in determining defendant's guilt or innocence, or his sentence, under the law applicable to the facts presented. We thus hold that the trial court did not abuse its discretion by failing *ex mero motu* to prohibit this line of questioning. *See State v. Clark*, 319 N.C. 215, 353 S.E. 2d 205 (proper for prosecutor to ask prospective jurors if the fact that the State was relying on circumstantial evidence would cause them any problems); *State v. Hedgepeth*, 66 N.C. App. 290, 310 S.E. 2d 920 (1984) (proper for defense counsel to ask prospective jurors if they

could follow instructions to consider defendant's criminal record only in determining his credibility).

Defendant next assigns error to the trial court's refusal to suppress evidence of his inculpatory post-arrest statements. He argues that he did not make a voluntary waiver of his *Miranda* rights and did not make his statements voluntarily.

After a voir dire hearing to determine the admissibility of defendant's statements, the trial court made findings of fact and conclusions of law, in pertinent part, as follows:

> [T]hat the defendant was arrested at the scene of the crime . . . [at] approximately six o'clock p.m. on December the 22nd, 1984; that he was charged with assault with a deadly weapon with intent to kill, three counts; that he was thereafter taken to the Anson County Hospital and treated for a wound to his head and to his buttocks; and that he was thereafter taken by van to . . . Central Prison for safekeeping; . . . that he was interrogated in the van enroute . . .; that the temperature and conditions inside the van were comfortable; . . .; that prior to any question or interrogation the defendant was advised of his constitutional rights . . .; that these rights were read to him; that he was advised of his rights at approximately 8:45 p.m., advised of his right to remain silent and [that] anything he said would be used against him as evidence in court, and advised of [his] right to have an attorney present before and during any questioning; that he was advised of a right to have an attorney appointed, if he couldn't afford one, the State . . . would appoint him one; that he was advised of his right to . . . stop answering questions at any time and not to resume until he had an attorney present if he wanted one; that he was advised of these rights by Special Agent Carl Jackson . . . of the [S.B.I.]; . . . that [Jackson] . . . was introduced as a law enforcement officer; and that he was also advised of his rights in the presence of Henry Watkins . . . and George Pratt . . . [;] . . . that the defendant replied orally in English that he understood all of this stuff, that he had been tried for his life in 1951, and that he had heard all of this stuff before, and that he understood his rights; that he stated that he did not want a lawyer present and that he stated that he would talk, but that he didn't

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want to sign anything because he could not see[;] . . . that he was interrogated in English by [Jackson] and at a later point questions were asked by [Watkins] and Pratt[;] . . . that the defendant is approximately sixty-five years old and he speaks and understands English[;] . . . that his educational background is very limited, that he has an I.Q. of approximately—between 74 and 98[;] . . . that his physical condition at the time of the interrogation was that he had been released from the hospital, that he had been treated for an injury to his eye; that his left eye was swollen shut; that he was blind in his right eye; that he had an injury to his hip from a gunshot wound; that both of these wounds had been treated by a physician at the Anson County Hospital; that he was in good condition otherwise; that he was sitting up and that other than the bandage he appeared basically [in] the same condition as he does in court today; that at one point . . . the defendant requested something to drink and . . . was provided with two soft drinks, which he consumed[;] . . . that the defendant had a slight to moderate odor of alcohol about his person and that at the time of the interrogation at 9:43 and thereafter that he was not under the influence of alcohol or drugs[;] . . . that the defendant was coherent, that he was understanding and that he was not confused and not complaining[;] . . . that the answers in relation to the questions asked were extremely reasonable, responsive and appropriate[;] . . . that no promises, offers of reward or inducement[s] by any law enforcement officers were made in order for the defendant to make a statement[;] . . . that there were no threats or suggest[ions] of violence or show of violence by any law enforcement officers made to persuade or induce the defendant to make a statement[;] . . . that the defendant made no statement desiring to stop the questions, but at one point he did request to be allowed to rest, and that he was allowed to rest for approximately seventeen minutes[;] . . . that the defendant made no request for an attorney during any of the questioning, and that the defendant expressly stated he did not want an attorney present; that the defendant . . . expressly stated that he did understand his rights; that he was unable to sign the written waiver, but that he did, in fact, make an expressed oral waiver to [Jackson]. And based on these findings of fact the Court would conclude as a

matter of law that under the totality of the circumstances none of the constitutional rights, neither Federal nor State, of the defendant were violated by his arrest, detention, interrogation, or confession; that there were no promises, offers of reward, or inducement[s] to the defendant to make a statement; that there were no threat[s] or suggest[ions] of violence or show of violence to persuade or induce the defendant to make a statement; that the statements made by the defendant to [Jackson] . . . were made freely, voluntarily and understandingly; that the defendant was in full understanding of his constitutional rights to remain silent, of his right to counsel, and all other rights; and that he freely, knowingly, intelligently and voluntarily waived each of those rights and thereupon made the statement to the officers above mentioned.

The court then overruled defendant's objection to admission of the statements.

Defendant contends that the above findings are not supported by the evidence. At a voir dire hearing on the admissibility of a confession, the trial court must determine whether the State has met its burden of showing by a preponderance of the evidence that the confession was voluntary. *State v. Corley*, 310 N.C. 40, 52, 311 S.E. 2d 540, 547 (1984). However, appellate courts do not apply the preponderance of the evidence test. *Id.* Rather, the findings are conclusive on appeal if they are supported by competent evidence in the record. *Id.; State v. Perdue*, 320 N.C. 51, 58, 357 S.E. 2d 345, 350 (1987). Despite conflicting evidence, "[n]o reviewing court may properly set aside or modify these findings if so supported." *State v. Jackson*, 308 N.C. 549, 569, 304 S.E. 2d 134, 145 (1983). However, the conclusions of law are fully reviewable. *State v. Perdue*, 320 N.C. at 58, 357 S.E. 2d at 350.

At the voir dire hearing, the trial court heard testimony from Dr. Mercedes Perry, S.B.I. Agent Carl Jackson, and Dr. Robert Rollins. Perry, a doctor at the Anson County Hospital, testified that:

Defendant arrived at the Anson County Hospital at around 6:30 p.m. Perry examined defendant and found that he had suffered a laceration to his forehead and a puncture wound to his buttocks. While these injuries are normally painful, defendant ex-

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pressed only discomfort. Defendant appeared intoxicated, and he had difficulty answering questions coherently. Defendant did not receive any narcotic medication, and he was not hallucinating. A little after 6:30 p.m., defendant underwent a blood alcohol test which indicated a blood alcohol level equivalent to a .26 reading on the breathalyzer scale. To accelerate defendant's recovery from his intoxication, Perry administered intravenous fluids, dextrose and water. After defendant received these fluids, his mental and physical condition improved considerably; he became more coherent and cooperative. When Perry last saw defendant, around 7:20 or 7:25 p.m., defendant had become far more lucid than he was when Perry arrived. In Perry's opinion, defendant's condition would have continued to improve over the next hour. Perry released defendant from the hospital so that he could be transported to Raleigh.

S.B.I. Agent Jackson testified that:

Jackson and two deputy sheriffs picked up defendant at the Anson County Hospital. The officers first drove their van to the Anson County Sheriff's Department where defendant was served with three warrants for assault with a deadly weapon with intent to kill. The officers then drove toward Raleigh to deliver defendant to Central Prison. Jackson advised defendant of his constitutional rights by reading from the S.B.I. interrogation form. In response, defendant stated: "I was tried for my life, and I understand all this stuff." At 9:43 p.m., Jackson read defendant an explicit waiver of rights. Defendant stated that he understood the waiver and that he would talk to the officers; however, he did not want to sign the waiver because he could not see it. After agreeing to waive his rights, defendant complained that he was thirsty, and the officers purchased two soft drinks, which defendant consumed.

Jackson made sure defendant knew he was talking with law enforcement officers. Jackson also informed defendant that they were transporting him to Central Prison for safekeeping. Jackson then began questioning defendant about the day's events. Defendant made incriminating statements that Jackson later recounted in his testimony to the jury. At 10:20 p.m., defendant wanted a break because he was tired, and Jackson stopped questioning him.

At 10:37 p.m., Jackson tapped defendant on the shoulder and asked if he was asleep. Defendant indicated that he was not sleep-

ing and that he was cold; the officers covered him with a sheet and turned up the heat. Jackson asked defendant to continue his story, but defendant became annoyed with Jackson. The other officers asked defendant if he would answer their questions, and defendant agreed. Defendant proceeded to make further incriminating statements that Jackson related to the jury. In particular, defendant explained that he shot Deputy Horne because "he pressured me the wrong way." An officer asked defendant if he was fearing for his life, and defendant replied: "I'm fearing for my life right now." After the officers assured defendant that he was in no danger, the discussion continued. At 10:55 p.m., defendant remarked that he was tired and his hip was beginning to hurt. The officers then terminated the interview.

During the interview defendant appeared rational, and his statements made sense. Defendant was able to sit upright in the van by himself. Defendant did complain about stiffness in his hip. He appeared sober despite a slight to moderate odor of alcohol about his person.

Defendant is blind in his right eye, and his left eye was swollen shut because of the injury to his forehead. When defendant complained of being cold, the officers turned up the heat and maintained a comfortable temperature in the van. Jackson did not offer defendant any reward in return for a statement. Jackson did not coerce or pressure him to make a statement. Defendant never asked for an attorney. Jackson knew that defendant had been convicted of first degree murder in 1951 and felonious assault with intent to kill in 1977.

Robert Rollins, a forensic psychiatrist, testified that:

Defendant suffers from mixed personality disorder including features of paranoid thinking, impaired abstract thinking, impaired judgment and impaired perception. He also suffers from organic delusional syndrome, manifested by false beliefs. Generally antisocial, defendant tends to overreact violently to perceived threats. Defendant engages in episodic alcohol abuse, but, according to defendant's supervisor, he was a good worker who did not drink on the job. When defendant was admitted to Dorothea Dix Hospital in February 1985, he achieved an I.Q. test score of seventy-four, which places him in the "borderline range of in-

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Based on Dr. Perry's description of defendant's condition and treatment on the night of the shooting, Rollins believed that defendant's intoxicated condition would have improved over time. Nonetheless, defendant would have been substantially intoxicated when the interrogation took place, and this intoxication would have exacerbated defendant's mental disabilities. Because of his mental disorders, defendant would not have been capable of voluntarily waiving his rights at the time of the interview.

The above *voir* dire testimony establishes that the pertinent findings are supported by competent evidence. They thus are binding on this Court. *State v. Perdue*, 320 N.C. at 59, 357 S.E. 2d at 350.

[3] In addition to a general challenge to the findings, defendant specifically disputes the finding that he made an express waiver of his rights. He contends that, rather than merely declining to sign a waiver he could not see, he in fact refused to waive his rights. Agent Jackson explicitly testified, however, that defendant stated that he understood his rights and agreed to talk with the officers. This evidence supports the trial court's finding.

[4] Defendant also specifically challenges the finding that he never expressed a desire to terminate the interview; he contends that he invoked his rights by asking the officers to terminate the questioning at 10:20 p.m. Jackson expressly testified, however, that defendant wanted to take a break because he was tired, and that he subsequently agreed to resume the conversation. Thus, the finding is again supported by the evidence.

Defendant further contends that the findings do not support the conclusions that he made a voluntary confession and waiver of his *Miranda* rights. While the findings, if supported by evidence, are binding upon this Court, the conclusions of law are fully reviewable. *Id.* The legal significance of the findings is a question of law for this Court. *State v. Jackson*, 308 N.C. at 582, 304 S.E. 2d at 152.

[5] In determining the voluntariness of the confession and the waiver of *Miranda* rights, we look to the totality of the circumstances. *Id.* at 581, 304 S.E. 2d at 152. However, police coercion is a necessary predicate to a determination that a waiver or statement was not given voluntarily within the meaning of the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. ---, 93 L.Ed. 2d 473 (1986). Because the purported waiver and the statement arose within the same set of circumstances, we discuss the voluntariness of the confession as a single issue. *Cf. State v. Corley*, 310 N.C. at 48, 311 S.E. 2d at 545 (despite compliance with *Miranda*, ultimate question determining admissibility of confession is whether it in fact was made voluntarily).

[6] Defendant previously had been convicted of two felonies. He told Agent Jackson that because of this experience, he understood "all this stuff" (i.e., his rights). Prior experience with the criminal justice system "is an important consideration in determining whether an inculpatory statement was made voluntarily and understandingly." *State v. Fincher*, 309 N.C. 1, 20, 305 S.E. 2d 685, 697 (1983) (defendant's one prior arrest considered significant in determining voluntariness of confession); *see also State v. Jackson*, 308 N.C. at 582, 304 S.E. 2d at 153. This circumstance thus supports the conclusions that the waiver and the confession were voluntary.

[7] While intoxication is a circumstance critical to the issue of voluntariness, intoxication at the time of a confession does not necessarily render it involuntary. *State v. Perdue*, 320 N.C. at 59-60, 357 S.E. 2d at 350-51. It is simply a factor to be considered in determining voluntariness. *See* Annot. "Sufficiency of Showing that Voluntariness of Confession or Admission was Affected by Alcohol or Other Drugs," 25 A.L.R. 4th 419 (1983 and Supp. 1987). The confession "is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E. 2d 200, 205 (1981).

At about 6:30 p.m. defendant had a blood alcohol level equivalent to a .26 reading on the breathalyzer scale, and he appeared intoxicated. Dr. Perry administered fluids to defendant to accelerate his recovery from his intoxication. During the next hour, Perry observed considerable improvement in defendant's mental and physical condition. Both Perry and Rollins agreed that defendant's condition would have continued to improve over time. The officers did not begin questioning defendant until some two

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hours after the blood alcohol test. Agent Jackson explicitly testified that defendant appeared to be sober during the interview. Jackson also stated that defendant spoke rationally and coherently. The trial court specifically found that defendant was not under the influence of alcohol during the interview. There was ample evidence to support this finding. *See State v. McClure*, 280 N.C. 288, 291, 185 S.E. 2d 693, 695 (1972). Therefore, the fact that defendant may have experienced some lingering, mild intoxication at the time of the confession did not preclude the conclusion that he confessed voluntarily. *State v. Perdue*, 320 N.C. at 59-60, 357 S.E. 2d at 350-51; *see also Bryant v. State*, 16 Ark. App. 45, 696 S.W. 2d 773 (1985) (less than an hour after defendant signed a waiver of his *Miranda* rights, he had a blood alcohol level of .28; waiver held voluntary). Rather, defendant's intoxication was relevant to his credibility, which was a question for the jury. *State v. McClure*, 280 N.C. at 290-91, 185 S.E. 2d at 695 (citing *State v. Logner*, 266 N.C. 238, 145 S.E. 2d 867, *cert. denied*, 384 U.S. 1013, 16 L.Ed. 2d 1032 (1966)).

[8] While important, subnormal mentality—standing alone—will not render a confession inadmissible. *State v. Taylor*, 290 N.C. 220, 231, 226 S.E. 2d 23, 29 (1976) (citing *State v. Thompson*, 287 N.C. 303, 318, 214 S.E. 2d 742, 752 (1975), *modified as to death penalty*, 428 U.S. 908, 49 L.Ed. 2d 1212 (1976)). If a person has the mental capacity to testify and to understand the meaning of his statements, he has sufficient mental capacity to make a voluntary confession. *Id.*

Rollins testified that defendant's I.Q. placed him in the borderline range of intellectual functioning; however, there was no testimony that defendant did not have sufficient intelligence to understand the meaning of his words. Moreover, Perry reported that after defendant received fluids he responded coherently to questions. Defendant spoke rationally during his extensive conversation with the officers. He held a job prior to the shooting, and his supervisor described him as a good worker. He also had sufficient mental capacity to testify at trial. The evidence thus permitted a conclusion that defendant had sufficient mental capacity to waive his rights and voluntarily confess.

[9] Rollins testified that defendant's mental disorders would prevent him from making a truly voluntary confession. However,

Jackson had ample opportunity to observe defendant at the time the waiver and statements were made, and he gave substantial testimony indicating that defendant was able to comprehend the discussion. When a non-expert has had a reasonable opportunity to observe a defendant and to form an opinion based on such observation, he may testify as to his opinion of the defendant's mental condition. *State v. Taylor*, 290 N.C. at 232, 226 S.E. 2d at 30. The evidence thus did not preclude a conclusion that defendant's mental disorders did not prevent his making a voluntary confession.

The evidence did not indicate that defendant's blindness or injuries at the time of his confession had any bearing on the voluntariness of his waiver and statement. They were not shown to have precluded understanding or a free exercise of the will. *Cf. State v. White*, 291 N.C. 116, 123, 229 S.E. 2d 152, 155 (1976) ("Illiteracy does not preclude understanding or a free exercise of the will.").

Finally, we note the absence of circumstances that we have often emphasized in our consideration of voluntariness:

> [Defendant] was not deceived or tricked about the nature of the crime involved or the possible punishment. . . . He was not subjected to prolonged uninterrupted interrogation. He was not subjected to physical threats or shows of violence. No promises were made to him in return for his confession.

State v. Jackson, 308 N.C. at 582, 304 S.E. 2d at 152-53 (citations omitted). The absence of these circumstances supports the conclusion that the waiver and statements were made voluntarily. *See Colorado v. Connelly*, 479 U.S. ---, 93 L.Ed. 2d 473.

[10] For the foregoing reasons, after a thorough review of the record we conclude that the totality of the circumstances permitted the trial court's conclusion that defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights and that his statements were made freely, understandingly, and voluntarily. We thus find no error in the denial of defendant's motion to suppress these statements.

[11] Defendant next challenges the overruling of his objection to the prosecutor's argument concerning the expert testimony of defendant's psychiatrists. The prosecutor argued:

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es the overruling of his objection to ncerning the expert testimony of de- rosecutor argued:

> Well, I want to tell you this about psychiatric testimony. If they were the so-called experts of all times and if the law recognized them as the expert[s] on what the condition of somebody's mind was, you wouldn't be hearing the case.
>
> MR. STOKES: OBJECT.
>
> THE COURT: OVERRULED. Go ahead
>
> MR. LOWDER: The law says that you may hear from the so-called expert witnesses, yes, and you can consider that, but it also says that you may take into account what other people have said about him. We've had other witnesses that told you about him. We had his neighbor right across the street to tell you how he was acting on this day.

Defendant contends that under N.C.G.S. § 8C-1, Rule 702, the law does recognize an expert forensic psychiatrist, qualified and accepted by the court, as an expert witness on "what the condition of somebody's mind was." He asserts that the prosecutor deliberately misstated the law in order to mislead the jury.

It is well-established in this jurisdiction that "[t]estimony regarding mental capacity is not confined to expert witnesses alone." *State v. Evangelista*, 319 N.C. 152, 162, 353 S.E. 2d 375, 382-83 (1987). "Anyone who has had a reasonable opportunity to form an opinion is permitted to give his opinion upon the issue of mental capacity." *Id.* at 162, 353 S.E. 2d at 383; *see also State v. Davis*, 321 N.C. 52, 55-56, 361 S.E. 2d 724, 726-27 (1987). The evidence here included both expert and non-expert opinion testimony on defendant's sanity at the time of the shooting. The argument in question was an exhortation to the jury to consider both kinds of testimony in resolving this question.

In isolation, the statement "if the law recognized them [psychiatrists] as the expert[s] on what the condition of somebody's mind was, you wouldn't be hearing the case" could be misleading. However, the prosecutor went on to state correctly that the law permits hearing from the experts and considering what they have to say. He then urged the jurors to consider not only the expert testimony but also that of the other witnesses. "Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is

extreme and is clearly calculated to prejudice the jury." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E. 2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985). Viewed in context, the potentially misleading portion of the prosecutor's argument was not so "extreme and . . . clearly calculated to prejudice the jury" as to warrant a holding that the trial court abused its discretion in overruling defendant's objection.

[12] Defendant next assigns error to the prosecutor's argument suggesting that the fact that defendant was competent to stand trial indicated that his insanity defense lacked merit. Defendant contends that this argument tended to confuse the jury by blending the issues of competency to stand trial and insanity.

Although potentially misleading, the argument did not misstate the law. It simply urged the jury to consider evidence of defendant's state of mind at the time of trial in passing upon his state of mind at the time of the shooting. The trial court gave clear and correct instructions on insanity. *See State v. Evangelista*, 319 N.C. at 181, 353 S.E. 2d at 382. In light of the foregoing, we decline to find an abuse of discretion in the failure to sustain defendant's objection to the argument.

[13] Defendant next contends that the trial court erred by sustaining the State's objection to a portion of his closing argument. Dr. Rollins had testified that defendant was legally insane at the time of the shooting and that he lacked the mental capacity to premeditate and deliberate the act. Addressing the relevance of Dr. Rollins' testimony, defense counsel argued:

> And he said too that at that time, on that evening, December the 22nd, 1984, that he could not premeditatedly [sic] or deliberate to shooting the deputy. That's what he said. How is that significant? His Honor—I believe he will charge you that in order for you to find the defendant guilty of first degree murder, that before you can do that, you've first got to be satisfied beyond a reasonable doubt [that] certain elements of the crime are met. Among those, one of the elements of first degree murder is that there was premeditation and deliberation, unlawful killing of a human being with premeditation and deliberation. Premeditation and deliberation. That thought went into it. That there was time to think, to reflect, to choose to do the thing.

...sulated to prejudice the jury." *State v.* ...111, 322 S.E. 2d 110, 122 (1984), *cert.* ...Ed. 2d 189 (1985). Viewed in context, ... portion of the prosecutor's argument ... clearly calculated to prejudice the ...ing that the trial court abused its dis...dant's objection.

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N.C.] IN THE SUPREME COURT 27

State v. McKoy

Dr. Rollins with all of his years of experience and with all of the work that went into his examination of Dock McCoy says he could not premeditate and deliberate at that time.

You've got to find before you can convict this man of first degree murder not only could he but that he did, so, in effect, what you've got to find is that not only was Dr. Rollins wrong about it, but that he was wrong about it beyond a reasonable doubt.

The following then occurred:

MR. LOWDER: We OBJECT to that.

MR. STOKES: That's a fair comment.

MR. LOWDER: We ask the Judge to rule on that objection.

. . .

THE COURT: I'll have to SUSTAIN that OBJECTION.

Defendant contends that his argument properly stated the proposition that the State bore the burden of proving beyond a reasonable doubt the premeditation and deliberation element of first degree murder. The State asserts that the argument implied that the State bore the burden of disproving the insanity defense, which is an inaccurate statement of our law. *State v. Mize*, 315 N.C. 285, 293-94, 337 S.E. 2d 562, 567 (1985). We conclude that the argument is reasonably subject to either of these interpretations. Although counsel should be allowed wide latitude in arguing to the jury, the control of the exercise of this privilege ordinarily lies in the sound discretion of the trial court. *State v. Robbins*, 319 N.C. 465, 505, 356 S.E. 2d 279, 303, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987). Because the jury could have interpreted defendant's argument to misstate the law as applied to the facts, we find no abuse of discretion in the sustaining of the objection.

Further, the charge correctly and unambiguously emphasized the State's burden of proving premeditation and deliberation beyond a reasonable doubt. *See State v. Mize*, 315 N.C. at 293, 337 S.E. 2d at 567. In light of this, and in view of the record as a whole, we do not believe there is a reasonable possibility that the jury would have reached a different result if the court had overruled the objection. Thus, assuming error, *arguendo*, defendant has not carried his burden of showing prejudice. N.C.G.S. § 15A-1443(a) (1983).

We conclude that the guilt phase of defendant's trial was fair and free of prejudicial error.

SENTENCING PHASE

[14] Defendant contends that he is entitled to a new sentencing hearing because the jury failed to find the statutory mitigating circumstance that "the defendant was under the influence of mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2) (1983). Defendant presented two psychiatrists who testified that he was suffering from significant psychological disorders at the time of the shooting. He argues that there thus was uncontradicted and inherently credible evidence to support the existence of this mitigating circumstance, and that the jury's refusal to find this circumstance makes the sentencing determination unreliable in violation of the Eighth and Fourteenth Amendments.

We conclude that other evidence regarding defendant's mental and emotional state at the time of the shooting conflicted with that presented by defendant's experts. Prior to the shooting, defendant had held the same job for four years, and his supervisor described him as a good employee. On the day of the shooting, defendant was able to aim and fire his shotgun. When confronted by Haskell, defendant was able to explain that he was firing his shotgun into the air because "it's Christmas." At several points prior to the shooting, defendant conversed with the officers. After receiving medical treatment for his gunshot wounds, defendant was able to answer Dr. Perry's questions coherently. During the ride to Raleigh, defendant "appeared to be rational in all respects." Defendant gave a detailed narration of the day's events, and he explained that the reason he shot Horne was because Horne "pressured" him. Agent Jackson testified that defendant responded logically, and with clarity of recollection and expression, to questions posed by the officers. Defendant's own witness, Dr. Lara, testified that he found no evidence that defendant suffered from hallucinations, delusions, or "an ongoing psychosis."

We also reject defendant's assertion that the testimony of his psychiatric experts was inherently credible. Defendant's mental

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herently credible. Defendant's mental

and emotional state *at the time of the crime* is the central question presented by the submission of the mitigating circumstance in question; however, neither of defendant's experts examined him until several weeks or months after the crime. *See State v. Smith*, 305 N.C. 691, 705-06, 292 S.E. 2d 264, 273-74, *cert. denied*, 459 U.S. 1058, 74 L.Ed. 2d 622 (1982) (State's evidence concerning defendant's mental capacity conflicted with defendant's expert's after-the-fact opinions: "jury's duty to decide what to believe"). The jury was not required to believe defendant's evidence simply because the State did not specifically refute the testimony of defendant's experts. "Determining the credibility of evidence is at the heart of the fact-finding function." *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 456 (1983).

Because the evidence concerning defendant's mental and emotional state was neither uncontradicted nor inherently credible, we find no merit in this argument. *See State v. Smith*, 305 N.C. at 706, 292 S.E. 2d at 274 ("all of the evidence" did not support the existence of a mitigating circumstance; defendant thus not entitled to peremptory instruction thereon).

[18] Defendant next contends that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's allowing the District Attorney, in closing argument, to remind the jurors of their commitments not to have sympathy for defendant because he was intoxicated. The argument was as follows:

> Number seven, [defendant's] ability to remember the events of December the 22nd, 1984, is actually impaired, they contend. And that's the last one. I don't know. He was drinking liquor and I told you before you were chosen as a juror that if it is shown that he's intoxicated, were you going to have sympathy, sympathetic to his cause. As I recall, you said you wouldn't. I don't know. He can remember what he did because he told the officers about it.

Defendant did not object to this argument at trial. We thus can find an abuse of discretion in the trial court's failure to intervene *ex mero motu only* if impropriety in the argument was "gross indeed." *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E. 2d 752, 761 (1979). We find no gross impropriety. We have held above that the trial court did not abuse its discretion by failing *ex mero motu* to prohibit voir dire questions to prospective jurors regard-

ing their sympathies toward an intoxicated person. We likewise find no abuse of discretion in the trial court's allowing the District Attorney—in closing argument, without objection—to gently remind the jurors of their responses to these questions.

[19] Defendant next contends that the trial court's sentencing instructions were erroneous and unconstitutional because they required jury unanimity on the existence of a mitigating circumstance before that circumstance could be considered for the purpose of sentencing. We find no error.

We resolved this issue contrary to defendant's position in *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983), *overruled on other grounds*, *State v. Shank*, 322 N.C. 243, 367 S.E. 2d 639 (1968). In *Kirkley*, the trial court instructed the jury that "the defendant has the burden of persuading the jury as to the existence of any mitigating circumstance and if all twelve jurors are unable to agree that a specific mitigating circumstance exists they must find that it does not exist." *Kirkley*, 308 N.C. at 217-18, 302 S.E. 2d at 156. Therefore, the jury could only find a mitigating circumstance if it unanimously agreed that it existed. The defendant argued that the court should have instructed that the jurors could only determine that a mitigating circumstance did not exist if they unanimously found that it did not exist. *Id.* at 218, 302 S.E. 2d at 157.

We held that in a capital case "the jury must unanimously find that an aggravating circumstance exists before that circumstance may be considered by the jury in determining its sentence recommendation" and that "consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." *Id.* We stated:

> The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances. The unanimity requirement is only placed upon the finding of whether an aggravating or mitigating circumstance exists. With the exceptions of who has the burden of proof and the different quantum of proof required to establish the existence of a circumstance, we see no reason to distinguish the method a jury must use in finding the existence or nonexistence of aggravating and mitigating circumstances during

an intoxicated person. We likewise in the trial court's allowing the argument, without objection—to eir responses to these questions.

that the trial court's sentencing in- nd unconstitutional because they the existence of a mitigating cir- stance could be considered for the d no error.

ontrary to defendant's position in , 302 S.E. 2d 144 (1983), *overruled onk*, 322 N.C. 243, 367 S.E. 2d 639 rt instructed the jury that "the do- uading the jury as to the existence and if all twelve jurors are unable ting circumstance exists they must irkley, 308 N.C. at 217-18, 302 S.E. y could only find a mitigating cir- reed that it existed. The defendant ave instructed that the jurors could ting circumstance did not exist if it did not exist. *Id.* at 218, 302 S.E.

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mitigating circumstances must be tion of aggravating circumstances. t is only placed upon the finding of or mitigating circumstance exists. ho has the burden of *proof* and the f required to establish the existence ee no reason to distinguish the in finding the existence or nonex- d mitigating circumstances during

the sentencing procedure. It must be kept in mind that when the sentencing procedure begins there are no aggravating or mitigating circumstances deemed to be in existence. Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case.

In determining whether a mitigating circumstance exists, the jury is free to consider all the evidence relevant to that circumstance. This procedure is in accord with the requirements of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978) and *Eddings v. Oklahoma*, --- U.S. ---, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982). We therefore find no error in the trial judge's instructions to the jury concerning the unanimity requirement on mitigating circumstances.

Id. at 219, 302 S.E. 2d at 187.

We have declined to reexamine our *Kirkley* holding in several cases, including the following: *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316 (1988); *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988); *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987); *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985); *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

As a matter of state law, then, this issue is clearly settled contrary to defendant's position. Defendant contends, however, that the recent decision of the United States Supreme Court in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), requires that we overrule *Kirkley* and its progeny. In *Mills*, the Supreme Court held that the trial court's instructions to the jury were constitutionally infirm because "reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at ---, 100 L.Ed. 2d at 400.

Mills is one of a long line of cases in which the United States Supreme Court has examined the constitutionality of state

capital-sentencing schemes. The Court has faced the tensions between two concerns relating to such schemes: the constitutional requirement of individualized sentencing, and the constitutional requirement that the death penalty not be inflicted arbitrarily and capriciously. In *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978), the court recognized that "[t]he signals from this Court have not . . . always been easy to decipher" and that it had "an obligation to reconcile previously differing views in order to provide [clear] guidance." *Lockett*, 438 U.S. at 602, 57 L.Ed. 2d at 988 (plurality opinion).

The plurality opinion in *Lockett* explained how, in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346 (1972), a plurality of the Court had concluded that "discretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment" because it was discriminatory, "wantonly" imposed and "afforded 'no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not.'" *Lockett*, 438 U.S. at 599, 57 L.Ed. 2d at 986 (quoting *Furman*, 408 U.S. at 257, 310, 313, 33 L.Ed. 2d at 359, 390, 392). In attempting to follow *Furman*, some states adopted mandatory death penalties for certain crimes, thus eliminating any jury discretion in sentencing. *Lockett*, 438 U.S. at 599-600, 57 L.Ed. 2d at 986-87.

In the wake of *Furman*, the Court examined death penalty statutes in five states. A plurality found the mandatory death sentence statutes in Louisiana and North Carolina unconstitutional. *Roberts v. Louisiana*, 428 U.S. 325, 49 L.Ed. 2d 974 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944 (1976). A plurality also found, however, that the Georgia, Texas, and Florida statutes, which were not mandatory and which provided certain safeguards to the defendant in the capital-sentencing process, were not constitutionally invalid. *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859 (1976); *Jurek v. Texas*, 428 U.S. 262, 49 L.Ed. 2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913 (1976). In *Gregg*, the plurality wrote that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Gregg*, 428 U.S. at 195, 49 L.Ed. 2d at 887. From these opinions, the plurality opinion in *Lockett* concluded that "sentencing procedures should not create 'a sub-

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stantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner.'" *Lockett*, 438 U.S. at 601, 57 L.Ed. 2d at 997 (quoting *Gregg*, 428 U.S. at 188, 49 L.Ed. 2d at 902).

> In the view of the three Justices. . . . *Furman* did not require that all sentencing discretion be eliminated, but only that it be "directed and limited." 408 U.S., at 189, 49 L.Ed. 2d 859, 96 S.Ct. 2909, so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many cases in which it is not." *Id.*, at 188, 49 L.Ed. 2d 859, 96 S.Ct. 2909.

Lockett, 438 U.S. at 601, 57 L.Ed. 2d at 997-98.

The plurality opinion in *Lockett* acknowledged that mandatory death sentencing was unconstitutional. "[T]he sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Lockett*, 438 U.S. at 601, 57 L.Ed. 2d at 998 (quoting *Woodson* v. *North Carolina*, 428 U.S. at 304, 49 L.Ed. 2d at 961 (plurality opinion)). The opinion stated that "the sentencer . . . [may] not be precluded from considering as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604, 57 L.Ed. 2d at 990 (emphasis in original).

Ohio's death-penalty statute, which the Court examined in *Lockett*, mandated the imposition of the death penalty where a jury had found at least one aggravating circumstance unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the court determined that at least one of three specified mitigating circumstances had been established by a preponderance of the evidence. *Id.* at 607, 57 L.Ed. 2d at 991-92. The plurality opinion concluded that "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments" because it "preclude[d] consideration of relevant mitigating factors." *Id.* at 608, 57 L.Ed. 2d at 992. Therefore, the Court reversed the imposition of the death penalty and remanded for resentencing. *Id.* at 608-09, 57 L.Ed. 2d at 992.

In *Eddings* v. *Oklahoma*, 455 U.S. 104, 71 L.Ed. 2d 1 (1982), the Supreme Court applied the *Lockett* rule that "the sentencer . . . [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 110, 71 L.Ed. 2d at 8 (quoting *Lockett*, 438 U.S. at 604, 57 L.Ed. 2d at 990) (emphasis in original). The trial judge in *Eddings* had stated that, as a matter of law, he could not take into consideration that the defendant had come from a violent background. *Eddings*, 455 U.S. at 112-13, 71 L.Ed. 2d at 9-10. The Supreme Court held that "the sentencer [may not] refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 114, 71 L.Ed. 2d at 11 (emphasis in original). The Court reversed the death sentence and remanded for resentencing. *Id.* at 117, 71 L.Ed. 2d at 12.

In *Mills* v. *Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384, the Supreme Court applied the *Lockett-Eddings* doctrine in holding that because the instructions to the jury on mitigating circumstances were potentially misleading, "[t]he possibility that the . . . jury conducted its task improperly . . . [was] great enough to require resentencing." *Id.* at ---, 100 L.Ed. 2d at 399. The verdict form in *Mills* had three sections:

> Section I stated:
>
> Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked "yes" has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked "no" has not been proven BEYOND A REASONABLE DOUBT[.]

Id. at ---, 100 L.Ed. 2d at 400. Following this paragraph was a list of the submitted aggravating circumstances, each of which was followed by two blanks—one for a "yes" answer, the other for a "no" answer. Section I concluded:

> (If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no" do not complete Sections II and III.)

Id. at ---, 100 L.Ed. 2d at 400-01.

death penalty and remanded for re-
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455 U.S. 104, 71 L.Ed. 2d 1 (1982), he *Lockett* rule that "the sentencer rom considering, *as a mitigating fac-*nt's character or record and any of nse that the defendant proffers as a death." *Id.* at 110, 71 L.Ed. 2d at 8 604, 57 L.Ed. 2d at 990) (emphasis in *Eddings* had stated that, as a matter to consideration that the defendant ground. *Eddings*, 455 U.S. at 112-13, reme Court held that "the sentencer *, as a matter of law*, any relevant 114, 71 L.Ed. 2d at 11 (emphasis in d the death sentence and remanded 71 L.Ed. 2d at 12.

86 U.S. ---, 100 L.Ed. 2d 384, the *Lockett-Eddings* doctrine in holding e to the jury on mitigating circum-isleading, "[t]he possibility that the mproperly . . . [was] great enough to ---, 100 L.Ed. 2d at 399. The verdict ions:

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400. Following this paragraph was a vating circumstances, each of which —one for a "yes" answer, the other concluded:

bove are marked "yes," complete Sec-ve are marked "no" do not complete

400-01.

Section II stated:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked "no" has not been proven BY A PREPONDERANCE OF THE EVIDENCE.]

Id. at ---, 100 L.Ed 2d at 401. As in the first section, the proposed mitigating circumstances, numbered 1 through 7, were listed, each with blanks for "yes" and "no." Number 8 read, "Other mitigating circumstances exist, as set forth below." *Id.* at ---, 100 L.Ed. 2d at 401-02. Section II concluded:

> (If one or more of the above in Section II have been marked "yes," complete Section III. If all of the above in Section II are marked "no," you do not complete Section III.)

Id. at ---, 100 L.Ed. 2d at 402.

Section III read:

> Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

Blanks designated "yes" and "no" followed. *Id.* at ---, 100 L.Ed. 2d at 403.

The fourth and final section read:

DETERMINATION OF SENTENCE

> Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:
>
> 1. If all of the answers in Section I are marked "no" enter "Life Imprisonment."
>
> 2. If Section III was completed and was marked "yes" enter "Life Imprisonment."
>
> 3. If Section II was completed and all of the answers were marked "no" then enter "Death."
>
> 4. If Section III was completed and was marked "no" enter "Death."

Id. at ---, 100 L.Ed. 2d at 403.

In Section I, the jury answered "yes" to one of the aggravating circumstances and "no" to the rest. In Section II, it answered "no" to mitigating circumstances 1 through 7 and "none" to number 8 (the "catchall"). Having found no mitigating circumstances, the jury did not answer Section III. It returned a death sentence in response to the mandate of number three in the final section. *Id.* at ---, 100 L.Ed. 2d at 400-03.

This sentencing scheme mandated the death penalty if the jury unanimously found at least one aggravating circumstance and did not unanimously find any mitigating circumstances. Because the jury found one aggravating circumstance and no mitigating circumstances, it was required as a matter of law to impose the death penalty without completing Section III, which called for the weighing of aggravating and mitigating circumstances.

The defendant challenged his conviction and sentence, arguing that Maryland's capital-punishment statute was unconstitutionally mandatory as applied to him, because "even if some or all of the jurors were to believe *some* mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the *same* mitigating factor, the sentence necessarily would be death." *Id.* at ---, 100 L.Ed. 2d at 392 (emphasis in original). The Supreme Court granted certiorari "[b]ecause of the importance of [this] issue in Maryland's capital-punishment scheme." *Id.* at ---, 100 L.Ed. 2d at 393.

After examining the verdict form and instructions under which the jury had sentenced the defendant to death, the Court concluded that even if the jurors had reached Section III, "they were not free . . . to consider *all* relevant evidence in mitigation as they balanced aggravating and mitigating circumstances. Section III instructed the jury to weigh only those mitigating circumstances marked 'yes' in Section II." *Id.* at ---, 100 L.Ed. 2d at 397 (emphasis in original).

> [T]here is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in at-

was completed and was marked "no"

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answered "yes" to one of the ag-
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> tempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. . . . The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.

Id. at ---, 100 L.Ed. 2d at 400. Because of the risk that the jury was improperly precluded from considering certain *relevant* mitigating evidence, the Court held that the Maryland scheme violated the doctrine articulated in *Lockett* and *Eddings*. *See id.* at ---, 100 L.Ed. 2d at 400. Therefore, the Court vacated the judgment of the Court of Appeals, insofar as it sustained the death penalty, and remanded for resentencing. *Id.* at ---, 100 L.Ed. 2d at 400.

In *Franklin v. Lynaugh*, --- U.S. ---, 101 L.Ed. 2d 155 (1988), a case decided after *Mills*, the Supreme Court again examined Texas' capital-sentencing process. That process provided for the submission of two "Special Issues" to the jury. If the jury answered "yes" to both questions, the defendant would be sentenced to death. *Id.* at ---, 101 L.Ed. 2d at 162. The defendant in *Franklin* requested instructions that the jurors should take mitigating evidence into account in answering the Special Issues, so that they could answer "no" to either one or both of the Special Issues, even if they otherwise would have answered the Special Issues "yes." *Id.* at ---, 101 L.Ed. 2d at 162-63. The trial court instead instructed the jurors that they should reach their verdict based on all the evidence. *Id.* at ---, 101 L.Ed. 2d at 163. The defendant argued that the Special Issues precluded the jury from considering certain mitigating evidence. Even though the Texas capital-sentencing process does not mention mitigating evidence, *id.* at ---, 101 L.Ed. 2d at 177 (Stevens, J., dissenting), the plurality opinion held that the Texas procedure was not unconstitutional.

The plurality opinion stated that there are "two lines of cases . . . [which] are somewhat in 'tension' with each other"—the cases holding that the jury must not be precluded from considering all relevant evidence, and the cases holding that states must channel the exercise of jury discretion, *id.* at ---, 101 L.Ed. 2d at

171, and that the procedure in Texas "accommodates *both* of these concerns." *Id.* at ---, 101 L.Ed. 2d at 171 (emphasis in original). The plurality opinion concluded that "*Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of . . . mitigating factors." *Id.* at ---, 101 L.Ed. 2d at 169.

> [T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.

Id. at ---, 101 L.Ed. 2d at 170. States "must channel the [capital] sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.* at ---, 101 L.Ed. 2d at 170 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L.Ed. 2d 398, 406 (1980) (plurality opinion) (footnotes omitted)).

Thus, the Supreme Court has given individual scrutiny to several states' capital-sentencing procedures to determine whether they were non-mandatory and allowed for individualized sentencing, yet adequately channeled the discretion of the sentencer. The Court has upheld some procedures—*see Franklin v. Lynaugh*, --- U.S. ---, 101 L.Ed. 2d 155; *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859; *Jurek v. Texas*, 428 U.S. 262, 49 L.Ed. 2d 929; *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913—while declaring others invalid—*see Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384; *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed. 2d 1; *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973; *Roberts v. Louisiana*, 428 U.S. 325, 49 L.Ed. 2d 974; *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944. Therefore, in examining the aspect of our capital-sentencing process in question here, we must look at that aspect individually and in the context of the whole.

In the case now before us, the verdict form in the sentencing phase had four sections:

The first section, Issue One, listed the submitted aggravating circumstances and asked whether the jury unanimously found

in Texas "accommodates *both* of
01 L.Ed. 2d at 171 (emphasis in
concluded that "*Lockett* does not
in structuring or giving shape to
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from the evidence the existence of any of those circumstances. The jury unanimously found the two aggravating circumstances submitted.

The second section, Issue Two, listed the submitted mitigating circumstances and asked whether the jury unanimously found from the evidence the existence of any of these circumstances. Of the eight mitigating circumstances submitted, the jury answered "yes" to two and "no" to six, including the "catch-all" ("[a]ny other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value").

The third section read:

ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO "YES." IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

Issue Three stated:

Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

Answer:

The fourth section read:

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

Issue Four stated:

Do you unanimously find, beyond a reasonable doubt, that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

Answer:

The jury answered "yes" to Issues Three and Four and returned a recommendation of the death penalty.

Our capital-sentencing procedure, as this case shows, differs in two significant ways from Maryland's procedure:

First, the instructions to the jury as to when it must impose the death penalty are different. Maryland's procedure required the jury to impose the death penalty if it "found" at least one aggravating circumstance and did not "find" any mitigating circumstances. It also required the jury to impose the death penalty if it unanimously found that the mitigating circumstances did not outweigh the aggravating circumstances. Issue Three here requires the jury to weigh the "found" mitigating circumstances against the "found" aggravating circumstances. In contrast to the Maryland procedure, however, it does not mandate the death penalty where there are no mitigating circumstances and at least one aggravating circumstance, nor does it mandate the death penalty if the mitigating circumstances do not outweigh the aggravating circumstances. Rather, it requires the jury then to answer Issue Four. Issue Four ensures that a jury may return a recommendation of life imprisonment if it feels that the aggravating circumstances are not sufficiently substantial to call for the death penalty, even if it has found several aggravating circumstances and no mitigating circumstances. Maryland's capital-sentencing procedure, which the Supreme Court found constitutionally infirm in *Mills*, did not include a section equivalent to Issue Four here.

Second, in North Carolina evidence in effect becomes legally irrelevant to prove mitigation if the defendant fails to prove to the satisfaction of all the jurors that such evidence supports the finding of a mitigating factor. "Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case." *State v. Kirkley*, 308 N.C. 196, 218, 302 S.E. 2d 144, 157 (1983). A requirement that the defendant must carry a certain evidentiary burden to prove the existence of a mitigating factor is a proper limitation of the jury's discretion. *See Patterson v. New York*, 432 U.S. 197, 201, 209, 53 L.Ed. 2d 281, 286-87, 291 (1977) (states normally have the power to regulate burdens of production and persuasion and "[i]f the State . . . chooses to recognize a factor that mitigates the degree of criminality or punishment, . . . the State may 'assure itself that the fact has been established with reasonable certainty'"). The instructions and verdict form in our capital-sentencing procedure serve to channel the jury's discretion by ensuring that, when

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the jury makes its final sentencing determination, it will only consider evidence which we have, in effect, determined to be relevant. If all the jurors do not agree on the existence of a specific mitigating circumstance, then the defendant has failed to meet his or her burden of proof on that circumstance and the evidence regarding it is not legally relevant for sentencing purposes. Therefore, the instruction to the jury to weigh only the mitigating circumstances "found" by a unanimous vote was an instruction to consider only the relevant mitigating evidence in answering Issues Three and Four.

In *Mills*, the Maryland Court of Appeals had held that jurors could only mark "no" on a mitigating circumstance when they unanimously found that mitigating circumstance not to exist. *Mills v. State*, 310 Md. 33, 56, 527 A. 2d 3, 13 (1987). Where some, but not all, jurors agreed on the existence of a mitigating circumstance, the jury could not mark "no" to that circumstance; thus, unlike in North Carolina, the mitigating evidence introduced to support that mitigating circumstance remained legally relevant even though the jurors did not agree unanimously on the existence of the mitigating circumstance.

The fact that such evidence remained legally relevant apparently was significant in the Supreme Court's resolution of *Mills*. The Court noted that "[n]o one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered legally 'irrelevant' by one holdout vote." *Mills v. Maryland*, --- U.S. at --- n.7, 100 L.Ed. 2d at 394 n.7. The Court went on to state that the problem in *Mills* was that in answering Section III of the verdict form, the jurors "were not free . . . to consider *all relevant evidence* in mitigation as they balanced aggravating and mitigating circumstances." *Id.* at ---, 100 L.Ed. 2d at 397 (emphasis added). The instructions in *Mills* were potentially misleading and thus inadequate because they did not clearly permit the jury to consider all relevant evidence. Under North Carolina law, the jury is not prevented from considering relevant mitigating evidence at any time during sentencing.

Like the United States Supreme Court, *see Godfrey v. Georgia*, 446 U.S. at 428, 64 L.Ed. 2d at 406, we have emphasized the need for guided discretion in the capital-sentencing process. In *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, ---

U.S. ---, 98 L.Ed. 2d 406 (1987), the defendant argued that the trial court erroneously instructed the jury that it could only consider the "found" mitigating circumstances in weighing the mitigating and aggravating circumstances. He contended that the jury should have been able to consider circumstances not "found" by the jury and even circumstances which had not been written on the verdict form. *Id.* at 217, 358 S.E. 2d at 25-26. We stated that such a procedure would "sanction an invitation to caprice" in the sentencing phase of a capital trial. *Id.* at 217, 358 S.E. 2d at 26. We discussed the concern, often articulated by the United States Supreme Court, that the jury's discretion must be limited to prevent arbitrary and capricious infliction of the death penalty:

> "The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances." There is no reason to confound the jury's decision process with arbitrary, "inarticulable" factors that may be applied in mitigation of a sentence but not in aggravation of it. "[T]he jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the 'carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused.' "

Id. at 217-18, 358 S.E. 2d at 26 (citations omitted); *see also State v. Kirkley*, 308 N.C. at 219, 302 S.E. 2d at 157.

[17] Our capital-sentencing procedure allows for individualized sentencing. It allows the jury to find circumstances in mitigation, both submitted circumstances and any other circumstance the jury deems to have mitigating value. It allows the jury to consider all relevant evidence in deciding whether to recommend a sentence of death. Finally, it requires the jury—before recommending that the defendant be sentenced to death—to weigh the "found" aggravating and "found" mitigating circumstances and to decide whether the "found" aggravating circumstances, considered with the "found" mitigating circumstances, are sufficiently substantial to call for the death penalty.

In addition to allowing for individualized sentencing, our capital-sentencing procedure also guides the jury's discretion so as to guard against the arbitrary and capricious infliction of the death penalty. It requires the State to prove the existence of an

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aggravating circumstance beyond a reasonable doubt. It requires the defendant to prove the existence of a mitigating circumstance by a preponderance of the evidence. It then allows the jury to consider only that evidence which is relevant, i.e., the evidence which the jury has unanimously "found," in sentencing the defendant.

Our capital-sentencing procedure thus provides a proper balance between individualized sentencing and guided discretion and therefore, we believe, conforms with federal constitutional requirements.

The Supreme Court granted certiorari in *Mills* "[b]ecause of the importance of the issue in Maryland's capital-punishment scheme." *Id.* at ---, 100 L.Ed. 2d at 290. The decision in *Mills* thus appears to be statute-specific. This conclusion is further supported by the Court's treatment of three cases immediately after the decision in *Mills*. The Court denied certiorari in two cases from this state which raised the issue of whether North Carolina's requirement of jury unanimity on the existence of mitigating circumstances is unconstitutional. *See State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988); *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1963), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 934 (1988). However, in a Maryland case raising the same issue as in *Mills*, the Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Mills*. *See Jones v. Maryland*, 310 Md. 569, 530 A. 2d 743 (1987), *cert. granted and judgment vacated*, --- U.S. ---, 100 L.Ed. 2d 916 (1988). We recognize that "a denial of a petition for a writ of certiorari . . . carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919, 94 L.Ed. 562, 566 (1950) (Frankfurter, J., opinion re: denial of certiorari); *see also Singleton v. Commissioner of Internal Revenue*, 439 U.S. 940, 944, 58 L.Ed. 2d 335, 336 (1978) (Stevens, J., opinion re: denial of certiorari). We do not suggest that the denial of certiorari in *Holden* and *Gardner* alone indicates that the Court decided that the defendants' arguments in those cases were without merit. However, we view the Court's action on *Jones* and its different treatment of *Holden* and *Gardner*, all in the immediate wake of *Mills*, as some indication that our capital-sentencing procedure differs sufficient-

ly from Maryland's that *Mills* does not control the question presented here.

In light of the foregoing precedent from the United States Supreme Court and from this Court, the differences between our capital-sentencing procedure and the Maryland procedure addressed by the Supreme Court in *Mills*, and the Supreme Court's treatment of *Jones*, *Holden*, and *Gardner* in the immediate wake of *Mills*, we are unable to conclude with any degree of certainty that *Mills* rendered our capital-sentencing procedure constitutionally infirm. We believe our clear, stable, considered procedure, established by *Kirkley* and adhered to in its progeny, is properly responsive to the requirement that capital-sentencing schemes provide for both individualized sentencing and guided sentencer discretion. We thus continue to adhere to our decisions in *Kirkley* and its progeny and hold that the instructions in question were without error.

Defendant raises the following "preservation" issues:

[18] (1) He contends that the trial court erred in denying his motion to require the State to disclose potential aggravating circumstances it intended to rely upon at sentencing. Such disclosure is not required. *State v. Holden*, 321 N.C. 125, 153-54, 362 S.E. 2d 513, 531 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988).

[19] (2) He contends that the trial court erred in placing the burden of proving the existence of mitigating circumstances on him rather than on the State. This was not error. *State v. Brown*, 320 N.C. 179, 216, 358 S.E. 2d 1, 25, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987).

[20] (3) He contends that the trial court erred in instructing the jury that it must recommend a death sentence if it answered issue four[1] affirmatively. This was not error. *State v. McDougall*, 308 N.C. 1, 26, 301 S.E. 2d 308, 323-24, *cert. denied*, 464 U.S. 985, 79 L.Ed. 2d 179 (1983).

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1. This issue was as follows: "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?"

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[21] (4) He contends that the trial court erred in sentencing him to death because N.C.G.S. § 15A-2000(e)(3)[1] is unconstitutionally vague and overbroad, both facially and as applied. The argument is without merit. *State v. Brown*, 320 N.C. at 213-14, 358 S.E. 2d at 23-24.

(5) He contends that N.C.G.S. § 15A-2000 in its entirety is unconstitutional. The argument is without merit. *State v. Brown*, 315 N.C. 40, 60-61, 337 S.E. 2d 808, 823-24 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988).

Defendant has not persuaded us that we should depart from our prior holdings on these "preservation" issues, and we decline to do so.

We conclude that the sentencing phase of defendant's trial was fair and free of prejudicial error.

PROPORTIONALITY REVIEW

Because we have found no error in the guilt and sentencing phases, we are required to review the record and determine: (1) whether the record supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1983); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E. 2d 279, 313 (1987).

The jury found, as aggravating circumstances, that (1) defendant had been convicted previously of a felony involving the use of violence to the person, and (2) the murder was committed against a deputy sheriff while engaged in the performance of his official duties. N.C.G.S. § 15A-2000(e)(3), (8) (1983). As to the first aggravating circumstance, the State presented uncontroverted documentary evidence establishing that defendant previously had

1. This statute establishes, as an aggravating circumstance which the jury may consider, the following: "The defendant had been previously convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3) (1983).

pled guilty to second degree murder and been sentenced to imprisonment of not less than twenty-two nor more than twenty-eight years. As to the second aggravating circumstance, the record contains plenary, uncontroverted evidence that the victim was, at the time of the shooting, a deputy sheriff engaged in the performance of his official duties. The record thus fully supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death.

We find nothing in the record which suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

[22] In conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 79, 337 S.E. 2d 808, 829 (1985). We use the "pool" of similar cases announced in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). *Id.* However, "[w]e do not find it necessary to extrapolate or analyze in our opinions all, or any particular number, of the cases in our proportionality pool." *State v. Robbins*, 319 N.C. at 529, 356 S.E. 2d at 316 (emphasis in original).

The crime here was committed against a law enforcement officer while he was engaged in the performance of his official duties. We have noted that this aggravating circumstance, found in N.C.G.S. § 15A-2000(e)(8), reflects the General Assembly's recognition of the "common concern" that "the collective conscience requires the most severe penalty for those who flout our system of law enforcement." *State v. Brown*, 320 N.C. at 230, 358 S.E. 2d at 35.

> The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public – the body politic – and is a direct attack upon the rule

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State v. Hill, 311 N.C. 465, 480, 319 S.E. 2d 163, 177 (1984) (Mitchell, J., dissenting).

Defendant argues that *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163, where a majority of this Court found the death sentence disproportionate, is the case in the pool most comparable to this one. We disagree. The defendant in *Hill* shot and killed a police officer in a struggle that ensued when the officer tackled the defendant. A significant factor in this Court's holding that the death sentence was disproportionate was "the incredibly short amount of time involved." *State v. Hill*, 311 N.C. at 479, 319 S.E. 2d at 172. *See also State v. Abdullah*, 309 N.C. 62, 306 S.E. 2d 100 (1983), where an officer entered a store while a robbery was in progress, the defendant's response in shooting him was almost instantaneous, and the jury recommended a life sentence. Here, by contrast, the killing followed a considerable period during which law enforcement officers and a neighbor attempted to persuade defendant to stop the shooting, and during which defendant expressly said to the victim: "You leave or I'll kill you."

Further, unlike in the present case, there is no indication in *Hill* or *Abdullah* that the defendants in those cases had been convicted previously of a felony involving violence against the person. We thus conclude that those cases are not sufficiently comparable to the present case to suggest or require a holding that the death sentence here is disproportionate.

Rather, the more comparable case is *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). There, "the record clearly establish[ed] a course of conduct on the part of the defendant which amount[ed] to a wanton disregard for the value of human life and for the enforcement of the law by duly appointed authorities." *Id.* at 337, 279 S.E. 2d at 810. We concluded that under such circumstances the sentence of death was not disproportionate or excessive, considering both the crime and the defendant. *Id.* at 337-38, 279 S.E. 2d at 810.

Here, as in *Hutchins*, on the day of the murder defendant engaged in a course of conduct that showed a wanton disregard for the value of human life. His episodic, random shooting—despite several warnings to stop it—threatened all who inhabited, or ventured into, the neighborhood. His ultimate violent act, which followed his own warning to the victim to "leave or I'll kill you," struck at the enforcement of the law by duly appointed authorities.

Thus, as in *Hutchins*, we conclude that nothing about the crime renders defendant's sentence of death disproportionate or excessive.

As to the defendant, the jury found—supported by competent, uncontroverted evidence—that he previously had been convicted of a felony involving the use of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1983). As noted, the record establishes that defendant had pled guilty to second degree murder and had been sentenced to imprisonment of not less than twenty-two nor more than twenty-eight years.[3] Defendant's prior offense thus involved the unlawful killing of another human being with malice, *see State v. Robbins*, 309 N.C. 771, 775, 309 S.E. 2d 188, 190 (1983), and was therefore among the most serious of the many felonies "involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3) (1983).

In *State v. Brown*, we note that the aggravating circumstance provided for in N.C.G.S. § 15A-2000(e)(3) "reflect[s] upon the defendant's character as a recidivist." 320 N.C. at 224, 358 S.E. 2d at 20. The jury in *Brown* found only the "prior violent felony" aggravating circumstance, *id.* at 219, 358 S.E. 2d at 27, whereas the jury here found the additional aggravating circumstance that the offense was committed against a law enforcement officer while he was engaged in the performance of his duties. N.C.G.S. § 15A-2000(e)(8) (1983). Further, the prior violent felony in *Brown* was the discharge of a shotgun into an occupied building—*id.* at 232, 358 S.E. 2d at 34—a considerably less serious offense than second degree murder, the prior violent felony here. We concluded in *Brown* that we could not hold as a matter of law

3. We take judicial notice of our own records—*In re Trucking Co.*, 285 N.C. 332, 337, 206 S.E. 2d 172, 176 (1974); *In re Williamson*, 67 N.C. App. 184, 185, 312 S.E. 2d 239, 240 (1984)—and note that prior to entering his plea of guilty of second degree murder on this charge, defendant had been found guilty of first degree murder and sentenced to death. This Court, however, awarded a new trial for errors in the instructions. *See State v. McKoy*, 296 N.C. 121, 71 S.E. 2d 901 (1982).

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that the death sentence was disproportionate. *Id.* at 231, 358 S.E. 2d at 34. *A fortiori*, the more serious nature of the total criminal conduct of the defendant here dictates the same conclusion.

We have carefully considered the circumstances of the offense and the character and propensities of the defendant as revealed by the record, briefs, transcript and arguments. We conclude that the facts of this case, combined with defendant's history, support the jury's decision to impose the ultimate penalty of death. We thus hold that the death sentence imposed is not disproportionate within the meaning and intent of N.C.G.S. § 15A-2000(d)(2). Upon this holding the death sentence is affirmed. "This Court has no discretion in determining whether a death sentence should be vacated. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703; *see Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973." *State v. Robbins*, 319 N.C. at 529, 356 S.E. 2d at 317.

No error.

Chief Justice EXUM dissenting.

I join in the dissenting opinions of Justice Martin and Justice Frye. I also dissent from the majority's position that *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), does not require us to overrule *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983), *overruled in part on other grounds, State v. Shank*, 322 N.C. 243, 367 S.E. 2d 639 (1988); and I write separately in support of my position that *Mills* does require us to overrule *Kirkley* and its progeny.

In *Kirkley* the question arose for the first time in this jurisdiction as to whether a jury in a capital sentencing proceeding must agree unanimously that a mitigating circumstance existed in order to consider that circumstance in the ultimate determination of whether the defendant should live or die. At the sentencing phase of Kirkley's trial the unanimity issue was not addressed in the trial court's initial jury instructions. After some deliberation the jury returned to the courtroom to ask specifically whether it must agree unanimously on each mitigating circumstance before it could continue to consider that circumstance in determining whether to impose death or life imprisonment. The trial court instructed the jury that it must unanimously agree on

each mitigating circumstance before it could continue to consider it in the ultimate balancing process. A majority of this Court in *Kirkley* held, contrary to the position of both the defendant and the state, that there was no error in the trial court's supplemental instructions on the unanimity question, saying, "Certainly consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." *Kirkley*, 308 N.C. at 218, 302 S.E. 2d at 157.

Dissenting on this issue in *Kirkley*, I adopted essentially what was then the state's position. The state in its brief in *Kirkley* said:

> *Lockett v. Ohio*, 438 U.S. 586 [57 L.Ed. 2d 973] (1978), holds that a statute that prevents the sentencer in all capital cases from giving independent weight to aspects in mitigation creates a risk that a death penalty will be imposed in spite of factors which call for a less severe penalty and thus is unconstitutional. It would seem manifestly improper, then, not to permit members of a jury to consider a factor in mitigation simply because all members of the jury were not satisfied with the defendant's showing concerning a particular mitigating circumstance. It would also make any sentencing procedure unmanageable if each time a jury deadlocked on an issue a new sentencing hearing was required.
>
> It is the State's position that only those mitigating circumstances found unanimously to exist should be listed on the verdict sheet recommended in *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 [72 L.Ed. 2d 155] (1982). *However, no juror should be precluded from considering anything in mitigation in the ultimate balancing process even if that mitigating factor was not agreed upon unanimously. To do otherwise, the State believes, could run afoul of Lockett v. Ohio, supra.*

Kirkley, 308 N.C. at 229, 302 S.E. 2d at 193 (emphasis supplied). I wrote in my *Kirkley* dissent:

> While the state's position on this question might pass constitutional muster, I think the better practice would be to instruct: (1) unanimity is not required in order to answer the

before it could continue to consider process. A majority of this Court in e position of both the defendant and error in the trial court's supplemen- nity question, saying, "Certainly bon- that a jury unanimously find that a sts before it may be considered for *Kirkley*, 308 N.C. at 218, 302 S.E. 2d

e in *Kirkley*, I adopted essentially position. The state in its brief in

8 U.S. 586 [57 L.Ed. 2d 973] (1978), prevents the sentencer in all capital endent weight to aspects in mitiga- a death penalty will be imposed in ll for a less severe penalty and thus uld seem manifestly improper, then, f a jury to consider a factor in miti- members of the jury were not satis- 's showing concerning a particular It would also make any sentencing if each time a jury deadlocked on an hearing was required.

dition that only those mitigating cir- imously to exist should be listed on mended in *State v. Rook*, 304 N.C. 681), *cert. denied*, 455 U.S. 1038 [72 *wever, no juror should be precluded ag in mitigation in the ultimate bal- hat mitigating factor was not agreed otherwise, the State believes, could Ohio, supra.*

S.E. 2d at 163 (emphasis supplied). I

osition on this question might pass think the better practice would be to not required in order to answer the

> question of the existence of a mitigating circumstance favorably to defendant; (2) such an issue should be answered unfavorably to defendant only if all jurors agreed to so answer it; (3) such an issue should be answered favorably to defendant if any juror would so answer it with an indication on the verdict form as to how many jurors so voted; and (4) in the final balancing process each juror would be free to consider only those mitigating circumstances which he or she were persuaded existed in the case.

Kirkley, 308 N.C. at 229-30, 302 S.E. 2d at 163. I still adhere to this position.

Despite the majority's valiant effort to explain *Mills* away, the *Mills* holding cannot be reconciled with our *Kirkley* holding on the unanimity question. Instead the *Mills* holding squarely sustains the position both the state and I took in *Kirkley* on this issue. Whatever escape from the *Mills* holding might be provided by differences in Maryland's and North Carolina's capital sentencing scheme or by the posture in which the *Mills* case reached the Supreme Court is effectively closed, it seems to me, by the rationale of the *Mills* decision as expressed in the opinion itself.

The majority correctly identifies the *Mills* holding: *Jury* instructions in a capital sentencing proceeding which create "a substantial probability that reasonable jurors . . . may well have thought that they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance" are constitutionally infirm under the Supreme Court's Eighth Amendment jurisprudence. *Mills*, 486 U.S. at ---, 100 L.Ed. 2d at 400. Our *Kirkley* holding is precisely to the contrary and should, therefore, yield.

The majority chooses instead to distinguish *Mills* on the basis of two circumstances urged upon this Court by the state as legally material differences.

The first difference suggested is that in Maryland a capital sentencing *jury* which finds at least one aggravating circumstance and fails to find any mitigating circumstances never engages in a balancing process and must return a sentence of death. In North Carolina even if one or more aggravating circumstances and no mitigating circumstances are found, the *jury* may nevertheless

elect not to impose the death penalty on the basis that the aggravating circumstances are themselves not sufficiently substantial to call for its imposition.

Relying on this difference in the two states' sentencing schemes as justification for continuing our *Kirkley* unanimity requirement ignores the rationale underlying the *Mills* holding as it is explained in the *Mills* opinion. It is true that the Supreme Court in *Mills* was concerned that a single holdout juror in Maryland on mitigating circumstances might force the imposition of the death penalty. The last substantive sentence of the *Mills* opinion is, "[t]he possibility that a single juror could block [consideration of mitigating evidence], and consequently require the jury to impose the death penalty, is one we dare not risk." *Mills*, 486 U.S. at ---, 100 L.Ed. 2d at 400. Indeed, in *Mills* the jury found the one aggravating circumstance submitted, found none of the several mitigating circumstances submitted and on that basis returned a sentence of death.

In Maryland, however, a jury finding one or more aggravating circumstances to exist and one or more mitigating circumstances to exist would then balance the conflicting sets of circumstances by determining whether the mitigating circumstances outweigh the aggravating. In this situation the Maryland sentencing scheme is indistinguishable in principle from North Carolina's.

In North Carolina when both mitigating and aggravating circumstances are found the *jury* must determine whether the mitigating circumstances are insufficient to outweigh the aggravating. If they are insufficient, then the aggravating circumstances must be considered with the mitigating circumstances and found to be sufficiently substantial to warrant imposition of the death penalty. In both balancing processes only those mitigating circumstances found to exist by all twelve jurors can be considered. Eleven jurors are prevented from considering mitigating circumstances they might wish to consider in these final balancing processes if the one remaining juror refuses to do so. This amounts to contradicting *Mills* by unconstitutionally precluding jurors in North Carolina from considering mitigating circumstances when they ultimately determine whether to impose the death penalty.

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The *Mills* rationale as expressed in the opinion leads inescapably to the conclusion that its holding would apply to a Maryland case whether the jury found no mitigating circumstance or at least one but not all the mitigating circumstances submitted to it. Since in this situation Maryland's capital sentencing scheme is no different from North Carolina's, it must follow that the *Mills* holding applies equally to North Carolina's capital sentencing scheme.

The Eighth Amendment jurisprudence upon which *Mills* rests is that in a capital case the sentencing authority may not be precluded from considering any relevant mitigating circumstance which might be proffered by the defendant as reasonably justifying a sentence other than death. *Skipper v. South Carolina*, 476 U.S. 1, 4, 90 L.Ed. 2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110, 71 L.Ed. 2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L.Ed. 2d 973 (1978). This jurisprudence is summarized at the outset of the substantive discussion in *Mills*. *Mills*, 486 U.S. at ---, 100 L.Ed. 2d at 393-94. Later in its opinion the Supreme Court posits a Maryland capital sentencing process under which the jury actually reaches the balancing stage, saying:

> Ordinarily, a Maryland jury reaches the balancing stage of the deliberation process any time it unanimously finds at least one mitigating circumstance, or, under the interpretation adopted by the Court of Appeals in this case, any time the jury does not unanimously reject all mitigating circumstances. Had the jurors that sentenced petitioner reached Section III, they would have found that even if they had read the verdict form as the Court of Appeals suggests they could have, and marked "yes" or "no" only on the basis of unanimity as to either, they were not free at this point to consider all relevant evidence in mitigation as they balanced aggravating and mitigating circumstances. Section III instructed the jury to weigh only those mitigating circumstances marked "yes" in Section II. Any mitigating circumstance not so marked, even if not unanimously rejected, could not be considered by any juror. A jury following the instructions set out in the verdict form could be "precluded from considering, as a *mitigating factor*, [an] aspect of a defendant's character or record [or] a circumstance[s] of the offense that the defendant proffer[ed] as a basis for a sentence less than death,"

> *Skipper v. South Carolina*, 476 U.S. at 4, 90 L.Ed. 2d 1, 106 S.Ct. 1669, if even a single juror adhered to the view that such a factor should not be so considered.

Mills, 486 U.S. at ---, 100 L.Ed. 2d at 397 (footnote omitted). Footnote 14 presses the point further:

> For example, some jurors in this case might have found that petitioner's age, 39, constituted a mitigating factor, i.e., youthfulness, under § 413(g)(5). Indeed, in his sentencing report the trial judge noted: "There was evidence from which the jury could have found the existence of Mitigating Circumstance No. 5 (youthful age)." App. 108. Other jurors, on the other hand, might have accepted the prosecutor's argument that petitioner was "not youthful in terms of the criminal justice system," id., at 79, because of his history of criminal activity. Under such circumstances, the lack of unanimity would have prevented the jury from marking that answer "yes." Regardless of whether the answer was marked "no" or left blank, the instructions in Section III would prevent those jurors who thought petitioner's youthfulness was relevant to the ultimate sentencing decision from giving that mitigating circumstance any weight.

Mills, 486 U.S. at ---, 100 L.Ed. 2d at 397-98 n.14.

The majority next attempts to distinguish *Mills* on the basis of the posture in which that case reached the Supreme Court. The majority notes that the Maryland Court of Appeals in its *Mills* opinion and the State of Maryland before the United States Supreme Court both conceded that mitigating evidence continued to be legally relevant even if the jury does not unanimously find it to have mitigating value; but in North Carolina such evidence ceases to be legally relevant if rejected by even one juror.

This argument stands *Mills* and the Eighth Amendment jurisprudence upon which it rests on their respective heads. The jurisprudence so far developed by the Supreme Court in a series of cases to which I have already referred is that the Eighth and Fourteenth Amendments preclude a state from creating barriers to the consideration by a capital sentencer of all evidence which may reasonably be said to have mitigating value. It makes no dif-

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ference what form these barriers take. The Supreme Court said unequivocally in *Mills*:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio, supra; Hitchcock v. Dugger*, 481 U.S. ---, 95 L.Ed. 2d 347, 107 S.Ct. 1821 (1987); by the sentencing court, *Eddings v. Oklahoma, supra*; or by an evidentiary ruling, *Skipper v. South Carolina, supra*. *The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance.* Whatever the cause, . . . the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Eddings v. Oklahoma*, 455 U.S. at 117, n*, 71 L.Ed. 2d 1, 102 S.Ct. 869 (O'Connor, J., concurring).

Mills, 486 U.S. at ---, 100 L.Ed. 2d at 394 (emphasis supplied).

"[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 345, 83 L.Ed. 2d 720, 737 (1985), quoting Fed. R. Evid. 401. As noted by Thayer, "The law furnishes no test of relevancy." E. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 265 (1898). The concept of logical relevancy employed in Rule 401 must be kept separate from issues of sufficiency of evidence for any purpose such as to satisfy a burden of production. M. Graham, *Handbook of Federal Evidence* § 401.1 (2d ed. 1986). This concept of relevancy is the same in the context of mitigating evidence in a capital sentencing proceeding as it is in other contexts. Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone

convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered. *Id.* at § 401.1 n.12.

To say, as the majority here does, that jury unanimity on a mitigating factor is necessary to make that factor legally relevant in the final balancing process seems not only to be a misuse of the concept of relevancy but also a classical case of circular reasoning with regard to the constitutional question presented. When the Supreme Court speaks in *Mills* of the constitutional necessity for permitting the sentencer in a capital case to "consider" all mitigating evidence in determining whether to impose or not to impose the death penalty, it clearly has reference to that stage of the process where the final sentencing decision is being made. It is at that stage where under *Mills* and its predecessors any juror must not be precluded from considering evidence that juror might reasonably believe to have mitigating value. It is not enough that the juror be permitted to "consider" the mitigating evidence at the point when the jury is trying to determine whether any particular mitigating circumstances exist. There is no question that all jurors were permitted to consider such evidence at that stage of the process in *Mills*.

Rather, the question presented in *Mills* is whether at the ultimate decision-making stage of a capital sentencing proceeding it is constitutionally permissible to preclude any juror from considering a mitigating circumstance that juror believes to exist because not all jurors agree on its existence. *Mills* answers that question "no." It also makes clear that the question must be answered "no" notwithstanding any procedural devices a state may employ to preclude the sentencer's consideration of mitigating factors at the ultimate decision-making stage. This means to me that North Carolina cannot preclude jurors from considering mitigating evidence at that stage by labeling the evidence legally irrelevant.

The majority relies in part on *Franklin v. Lynaugh*, --- U.S. ---, 101 L.Ed. 2d 155 (1988), for the proposition that it is permissible for states to structure, direct and focus the jury's consideration of mitigating evidence. Guiding and structuring the jury's consideration of mitigating evidence is one thing; precluding the jury's consideration of such evidence at the final decision-making

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stage is quite another. *Lynaugh* permits the former; *Mills* prohibits the latter. Indeed, the Supreme Court concluded the instructions in *Lynaugh* were not constitutionally infirm "[b]ecause we do not believe that the jury instructions or the Texas Special Issues precluded jury consideration of any relevant mitigating circumstances in this case, or otherwise unconstitutionally limited the jury's discretion . . . ." *Lynaugh*, --- U.S. at ---, 101 L.Ed. 2d at 171.

Because the majority's reliance on the Supreme Court's denial of certiorari in two North Carolina cases in which the *Mills* issue was raised is sparing and properly carries with it the recognition that such denials mean nothing with regard to the Court's views on the merits of the case, I see little need to respond to this aspect of the majority's opinion. Suffice it to say that, according to the authorities cited by the majority, the Supreme Court's position on the issue of the unanimity requirement vis-a-vis mitigating circumstances in a capital sentencing procedure should be determined entirely from its holding and its analysis in *Mills* and not at all from its denials of applications for writs of certiorari in cases in which this issue might have been raised.

Justice FRYE joins in this dissenting opinion.

Justice FRYE dissenting.

Believing that the defendant has not received a fair and impartial trial, I dissent from the majority's decision in both the guilt-innocence and sentencing phases of the trial. First, I am convinced that under the totality of the circumstances, defendant's oral confession was not knowingly and voluntarily made and, for that reason, its admission in evidence against him was error. These circumstances are set out in some detail in the dissenting opinion of Justice Martin in which he concludes that the defendant is entitled to a new trial. I concur in that portion of his opinion.

I also conclude that the defendant is entitled to a new sentencing hearing as stated in the dissenting opinion of the Chief Justice for the reasons stated in his dissenting opinion.

I write separately because I disagree with the majority's treatment of two other issues which bear directly upon the guilt-

innocence phase of the trial and indirectly, if not directly, upon the jury's determination of whether the defendant should receive life imprisonment or the death penalty. My first difference with the majority relates to its treatment of the fact that both the trial court and the prosecutor informed the jury that the trial was subject to appellate review.

Defendant argued that the fact that both the trial court and the district attorney informed the jury that defendant's trial was subject to appellate review constitutes reversible error; that conveying that information to the jury fatally undermined the reliability of the jury's determination that defendant was guilty of murder in the first degree and the jury's conclusion that death was the appropriate punishment. The majority responds by reviewing this Court's decisions in *State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975), and *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979), and the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed. 2d 231 (1985), concluding that those cases

> stand for the proposition that statements by the trial court or prosecutor that tend to dilute the jury's sense of responsibility for its determinations by suggesting that its verdict will be reviewed, or that the punishment imposed will be withheld, are impermissible and prejudicial. *See* 75 Am. Jur. 2d *Trial* § 230 (1974) ('[c]omments . . . on the power of the court to suspend sentence or to set the jury's verdict aside, or statements that a higher court has the power to review the finding of the jury on the weight of the evidence, are calculated to induce the jury to disregard their responsibility, and are improper.').

The majority then proceeds to distinguish the above cases from the instant case. I find those cases controlling. In *White*, the prosecutor told the jury that "[if] any error is made in this court, [the Supreme] Court will say." *White*, 286 N.C. at 402, 211 S.E. 2d at 449. Here, the prosecutor argued, "[t]here is a right of appeal to any interpretation of laws and application of laws which are present in this case."

Further, in *White* the court stated to the jury that "the Supreme Court will review this case." *Id.* at 402, 211 S.E. 2d at 449. This Court concluded that by that "positive statement . . .

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court stated to the jury that "the this case." *Id.* at 402, 211 S.E. 2d at at by that "positive statement . . .

the jury was bound to have understood that the court assumed [that] their verdict would be guilty." *Id.* at 404, 211 S.E. 2d at 450-51. Here, the judge told the jurors that the court reporter

> will be taking down everything that's said or done during the trial so that everything is a matter of public record and then she can type up a transcript of a trial and they mail it down to the Supreme Court and the Supreme Court can review what we're doing up here in Stanly County.

The majority draws a distinction between the use of the words "will review" in *White* and "can review" in the instant case. The distinction, in context, is too fine. As this Court made clear in *White*, a jury in a capital case must weigh the evidence and find the facts on the assumption that whatever verdict they render will be the final disposition of the case. When the judge tells the jurors that the court reporter is taking everything down so that it is a matter of public record, that it will be mailed down to the Supreme Court so that the Supreme Court can review "what we're doing up here in Stanly County," reasonable jurors could easily believe, as stated by this Court, in *State v. Jones*, 296 N.C. 495, 500, 251 S.E. 2d 425, 428, "that the Supreme Court would share with them a burden and responsibility which was in fact their sole responsibility." This belief is further encouraged when the court overrules defendant's objection to the prosecutor's argument that if convicted defendant can appeal on points of law. As Chief Justice Sharp intimated in *White*, jurors may not fully comprehend "the nature of the Supreme Court's review of a case upon appeal and . . . the difference between 'triers of the facts' and judges of the law." *White*, 286 N.C. at 404, 211 S.E. 2d at 450. Here, the trial judge both directly told the jury that its verdict was subject to appellate review and, subsequently, sanctioned the State's comments on that subject by overruling defendant's timely objection. Given those facts and the prior holdings of this Court, defendant's conviction and sentence of death should be vacated and this case remanded for a new trial.

I also disagree with the majority's treatment of defendant's contention that the trial court erred by allowing the prosecutor, during voir dire, to "stake out" the jurors by obtaining commitments from them to disregard defendant's intoxication in determining the existence of premeditation and deliberation and to

reject his voluntary intoxication defense. The purpose of voir dire examination of prospective jurors is to secure an impartial jury. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978). To assure that end, this Court has repeatedly held it improper for counsel to "stake out" jurors during voir dire by posing hypothetical questions designed to elicit in advance what a juror's decision will be under a certain state of evidence or upon a given state of facts. *See, e.g., State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986); *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (1985); *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1981); *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *modified as to death penalty*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976).

The prosecutor asked the prospective jurors "if it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you in your opinion to have sympathy for him and allow that sympathy to affect your verdict?" The jurors assured the prosecutor that they would not let that fact influence their decision. Further, at the sentencing stage, the prosecutor stated "he was drinking liquor and I told you before you were chosen as a juror that if it is shown that he's intoxicated, were you going to have sympathy, sympathetic to his cause. As I recall, you said you wouldn't."

Allowing the prosecutor to seek and obtain commitments from the jurors was tantamount to asking them to ignore evidence of intoxication in reaching their verdict and in determining the appropriate sentence. The evidence of defendant's intoxication was overwhelming. Deputy Sheriff Lambert went to defendant's home in response to a report that defendant was drunk and firing a shotgun. Deputy Lambert testified that defendant would mumble but he could not understand him and that defendant, though standing, was "wobbly." The emergency room physician testified that defendant had a strong odor of alcohol, did not respond coherently to the doctor's questions, and, notwithstanding a laceration to his skull and a wound to his left buttocks, did not complain of any pain and was not given any medication for pain. Defendant had a blood alcohol level of .264 shortly after the shooting. Dr. Robert Rollins, clinical director of the Dorothea Dix forensic psychiatry unit, included among defendant's diagnoses: "episodic alcohol abuse," "alcohol intoxication, recovered," and

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"organic delusional syndrome." In Dr. Rollins' professional opinion, defendant could not distinguish between right and wrong at the time of the offense and could not have formed the specific intent to kill the officer. In the opinion of Dr. Patricio Lara, another Dorothea Dix Hospital psychiatrist who also examined defendant, his intoxication, together with his limited intellectual functioning and personality disorder, resulted in an impairment of his ability, at the time of the offense, to conform his conduct with the requirements of the law.

Intoxication, even when voluntary, may constitute a valid defense to the charge of murder in the first degree. *See, e.g., State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983) (if defendant was intoxicated to a degree precluding premeditation and deliberation, he cannot be found guilty of murder in the first degree); *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978) (defendant cannot be convicted of murder in the first degree if intoxicated to a degree sufficient to preclude forming a specific intent to kill).

This Court has held that "[a] juror who reveals that he is unable to accept a particular defense or penalty recognized by law is prejudiced to such an extent that he can no longer be considered competent." *State v. Leonard*, 296 N.C. 58, 62-63, 248 S.E. 2d 853, 855 (1978). Thus, permitting defendant to be tried for his life by a jury whose members had expressly committed themselves to disregard what proved to be substantial evidence that defendant was highly intoxicated at the time the fatal shot was fired infringed upon his fundamental right to be tried by an impartial jury.

As stated by the Supreme Court of Mississippi in *Stringer v. State*, 500 So. 2d 929 (1986):

> It is improper influence to put the jury in a 'box' by *voir dire* tactics which extract a promise, prior to trial, to ignore evidence favorable to the defendant. This promise or pledge prevents the jurors from considering all facts relevant to the verdict. The jurors are then called upon during closing arguments to fulfill that promise, and the effect—whether calculated or not—is to shame or coerce the jury into rejecting factors which would tend to mitigate against the death penalty.

Id., 500 So. 2d at 936-37.

For all of the reasons indicated herein, and for the reasons set forth in the dissenting opinion of Justice Martin, defendant should be given a new trial. Even if his conviction is upheld, he should be given a new sentencing hearing for the reasons stated in the dissenting opinion of the Chief Justice.

PROPORTIONALITY

Because I do not believe that defendant has received a fair trial free of prejudicial error, I would not reach the question of proportionality. However, since the majority reaches that question and finds that the death sentence is not disproportionate in this case, I write to express my disagreement with that conclusion also.

As the majority correctly states, in conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E. 2d 808, 829 (1985). There are four cases in the proportionality pool in which defendants killed law enforcement officers engaged in the performance of their official duties. Those cases are: *State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985), *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984); *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983), and *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981).

In *Payne*, defendant murdered a detective who had earlier arrested him on a drug charge. He handcuffed the detective's hands behind his back and pushed him into a river to drown. The jury returned a verdict of life imprisonment. In *Hill*, a policeman chased and tackled the defendant who was suspected of having committed a felony. During the ensuing struggle, defendant managed to get possession of the officer's pistol and shot and killed him. This Court found the death sentence disproportionate and sentenced defendant to life imprisonment. In *Abdullah*, defendant conspired with others to commit an armed robbery and shot the policeman several times during the course of the robbery, killing him. The jury returned a verdict of life imprisonment. In *Hutchins*, the defendant shot and killed two officers and then shot and killed a third officer who was attempting to arrest him. This Court upheld the sentence of death.

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When considering the crime and the defendant and comparing this case with the crime and the defendants in the other four cases involving the killing of law enforcement officers, I find the instant case more like *Abdullah*, *Hill*, and *Payne* than *Hutchins*. Thus, I agree with defendant that to conclude that he deserves to die, when the defendants in *Abdullah*, *Payne*, and *Hill* were spared that ultimate penalty, would defeat the purpose of proportionality review mandated by the legislature, which, as this Court stated in *State v. Jackson*, 309 N.C. 26, 46, 305 S.E. 2d 703, 717 (1983), "is to serve as a check against the capricious or random imposition of the death penalty." Thus, were I to reach proportionality, I would find the death sentence in the instant case disproportionate as a matter of law and sentence defendant to life imprisonment.

Chief Justice EXUM joins in this dissenting opinion.

Justice MARTIN dissenting in part.

I respectfully dissent from the holding of the majority that defendant's inculpatory statements were admissible; otherwise, I concur in the majority opinion, including specifically, the resolution of the issue arising under *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988).

With respect to the confession issue, the majority approves the admission of inculpatory statements by a sixty-five-year-old black man with an I.Q. of 74, blind in one eye, his other eye injured and bandaged so that he could not see, wounded and treated at the hospital, with a blood alcohol level of .264, afraid for his life, travelling in a van with officers for over two hours from Anson County to Raleigh, at times cold and thirsty, suffering from his wounds, and being, in the opinion of Dr. Rollins, incapable of appreciating the waiver of his constitutional rights. In this I cannot concur.

Perhaps by finecombing the record, as the majority has done, some evidence can be found which when isolated may support some of the trial court's findings of fact. The true test of the voluntariness of a confession, though, is found in the totality of the circumstances. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). Once it is established that the procedural requirements of

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), have been met, the determination of whether defendant's confession was knowingly and voluntarily made must be found from considering all of the circumstances of the case. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984).

What were the totality of the circumstances when defendant confessed?

THE ENVIRONMENT

First, it is to be noted that defendant was in a sheriff's van, being transported to Raleigh "for safekeeping" without the issuance of a judicial order authorizing the transfer. N.C.G.S. § 15A-521 (1983). Although an officer testified that "warrants" were served on defendant while in the van, no warrants appear in the record on appeal. The crime occurred and defendant was taken to Raleigh on 22 December 1984. The order of arrest in the record on appeal was served on defendant on 24 January 1985. So we have a defendant being unlawfully transported in a van through the black of night by hostile officers, alone, with no way to contact anyone outside the van as a witness or otherwise.

The trial court failed to consider the actions of the officers in removing defendant from the hospital and interrogating him in the isolated and coercive environment of a moving police van. Compelling a suspect to travel during interrogation, or interrogating a suspect during travel, is a factor which suggests involuntariness. *Clewis v. Texas*, 386 U.S. 707, 18 L.Ed. 2d 423 (1967). Here, the defendant was completely incommunicado and isolated from the police station or the jail. This was obviously done for the purpose of interrogating the defendant in an environment conducive to producing inculpatory statements. These are factors indicating involuntariness. This is particularly true when the defendant is susceptible to coercion. *Vernon v. Alabama*, 313 U.S. 547, 85 L.Ed. 1513 (1941) (per curiam); *White v. Texas*, 310 U.S. 530, 84 L.Ed. 1342 (1940). The officers were fully aware that the defendant had been badly wounded by gunfire shortly before the interrogation. They knew that defendant had been extremely intoxicated when he was brought to the hospital. They knew he was blind and in a severely weakened physical condition. Having this knowledge, the officers took the defendant from the hospital on a gurney, placed him into a police van coutaining three of-

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ficers, and commenced the nighttime ride from Wadesboro to Raleigh. In so doing, the officers deliberately cut defendant off from the outside world, leaving him in a position of extreme vulnerability to their interrogation. It is difficult to conceive of a fact situation more conducive to overbearing a defendant's will than the one existing in this case.

THE DEFENDANT

The defendant at the time of this offense was sixty-five years of age. He was suffering from serious gunshot wounds sustained in the preceding hours. He was blind, mentally disordered, had a borderline intellect, and was under the influence of alcohol. He expressed to the officers that he was afraid for his life at the time they were interrogating him in the police van. Dr. Perry, an emergency room physician, testified that defendant was brought to the hospital by ambulance around 6:30 p.m. Dr. Perry treated him in the trauma facility for two serious gunshot wounds, one a laceration through the forehead down to the skull, the other a puncture wound to the buttocks. The head wound was about six centimeters long and very deep, the bullet passing through the entire thickness of the forehead down to the skull. The wound to the buttocks was a through-and-through injury, about ten to twelve centimeters in length. Defendant was semiconscious at the time of his arrival and unable to respond coherently to the doctor's attempts to communicate with him. Such wounds are normally very painful, but defendant did not indicate that he was suffering the normal degree of pain, which the doctor attributed to the degree of defendant's alcoholic intoxication, which was a blood alcohol level of .264. Dr. Perry treated defendant's wounds for some forty minutes, closing them with sutures. They were heavily bandaged, completely closing the defendant's good eye, he being blind in the other eye. During the treatment defendant was administered intravenous fluids for the purpose of elevating his blood pressure, according to Dr. Perry.

Dr. Rollins is an expert medical witness, a forensic psychiatrist, and employed by the state. He examined the defendant several times with respect to this incident. He testified that defendant had multiple personality disorders, including paranoid and delusional thinking, with impaired judgment and perception. In 1980 he had scored 89 on an I.Q. examination, but later, at the

time of this event, his I.Q. test score had deteriorated to 74, which placed defendant in the borderline range of intellectual functioning. Dr. Rollins further testified that defendant was substantially intoxicated at the time of the interrogation and that this condition would exacerbate defendant's mental disabilities. He expressly testified that defendant, because of his mental disorders and his physical condition at the time, was incapable of knowingly and voluntarily waiving his constitutional rights at the time that he was interrogated by the officers.

The trial judge failed to make any findings as to the defendant's mental condition and completely overlooked the deteriorating mental and psychotic condition of the defendant which had occurred over the past five years as evidenced by the decline in his I.Q. scores. The court's determination that defendant had an I.Q. at the time of the interrogation between 74 and 89 is unsupported by the evidence. The only relevant evidence indicates that at the time of the interrogation defendant's I.Q. was 74, having deteriorated from the 89 that he had scored some five years previously. Mental handicaps which make a defendant particularly susceptible to the influence of others are an important factor in weighing voluntariness. *Jurek v. Estelle*, 593 F. 2d 672 (5th Cir. 1979). Further, a defendant's physical condition is an important factor in determining whether a confession is voluntary. *Cooper v. Griffin*, 455 F. 2d 1142 (5th Cir. 1972). *See also State v. Dailey*, 351 S.E. 2d 431 (W. Va. 1986).

In *Colorado v. Connelly*, 479 U.S. ---, 93 L.Ed. 2d 473 (1986), the United States Supreme Court held that ordinarily a defendant's mental impairment, standing alone, is not a sufficient basis for ruling a confession involuntary. However, in this case, we have not only the defective mental condition of the defendant, but also the coercive environment in which the officers placed the defendant, together with his impaired physical condition. These factors considered together are sufficient to show involuntariness.

THE INTERROGATION

After placing the defendant in the police van and beginning the journey to Raleigh, the officers informed the defendant of his rights as they were leaving the Wadesboro city limits. To this the defendant responded: "I was tried for my life and I understand all this stuff. I was tried for my life back in 1951." Interestingly,

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Miranda warnings were not required until 1966, fifteen years *after* defendant's earlier court experience. The officers testified that after being read his rights defendant said "[h]e did understand but he did not want to sign anything because he couldn't see." From this testimony, the trial court found that the defendant made an "express" statement that he did not want an attorney present. A fair reading of this testimony, however, only shows that the defendant responded that he understood his rights, but he did not want to sign anything because he could not see. There is no indication in this testimony that the defendant expressly waived the presence of counsel. He did not go the additional step and say: "I don't want a lawyer now." Of course, it is not essential that there be an express waiver by defendant. However, the court must presume that the defendant did not waive his rights. *State v. Connley*, 297 N.C. 584, 256 S.E. 2d 234, *cert. denied*, 444 U.S. 954, 62 L.Ed. 2d 327 (1979). The trial court's finding of an express waiver is unsupported by the evidence. Nowhere does the trial court find an implied waiver under all the circumstances of the case, and none can be so found. For this reason, I think the trial judge's order is fatally flawed.

The interrogation continued for some two hours, and during this time the officers obtained admissions from defendant that proved to be critical to the state's case. During the interrogation, the defendant stated, "I'm fearing for my life now." Although the officers testified that they assured defendant that he had nothing to fear, the defendant could not see the officers and had no way of knowing what they were doing in the van. He also had no way of knowing where they were taking him, even though one officer said he was being taken to Raleigh for safekeeping. Certainly, in view of the environment in which he was situated and his physical and mental condition, it is reasonable that the defendant was fearful for his life at the time that he was being interrogated. That fact alone is sufficient to refute any finding of voluntariness.

During the interrogation the defendant was suffering from his painful bullet wounds. There is no evidence that he had been given any sedatives or painkillers to alleviate his suffering. The record shows that defendant voiced numerous complaints during the interrogation and that he was experiencing physical discomfort.

At one point defendant told the officers that he was tired and wanted to stop the interrogation. He also complained at that time that he was cold, and the heat in the van was turned up and he was given a sheet to cover himself. After a short period, one of the officers asked defendant if he wanted to talk. Defendant stated that he did not want to talk to Officer Jackson. One of the other officers asked defendant if he would talk with him, and defendant agreed. This procedure by the officers violates the ruling of *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984 (1981). In *Edwards*, the Court held that when a suspect indicates his desire to stop the interrogation, the officers must terminate it and the interrogation cannot be resumed until initiated by the suspect. Here, the evidence clearly shows that defendant desired to terminate the interrogation. He said that he was tired and wanted to stop. The officers stopped for a short time and then, without any initiation of the interrogation by the defendant, the officers resumed the process of examining the defendant. For this reason, the confession was not admissible.

Thus, I find defendant's statement to be involuntary and the result of his being unlawfully placed in a coercive environment while severely handicapped, both mentally and physically, and interrogated in violation of *Edwards v. Arizona* while fearful for his life. Defendant is entitled to a new trial.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

STATE OF NORTH CAROLINA v. ELTON OZELL McLAUGHLIN

No. 627A84

(Filed 7 September 1988)

1. Constitutional Law § 28— complicated case—denial of motion to have trial judge retain jurisdiction over all matters—no due process violation

The trial court did not err in a prosecution for three first degree murders by denying defendant's motion to have the trial judge retain jurisdiction over all matters pertaining to the trial on the grounds that this was a complicated case and that due process therefore required one judge to hear all pretrial mo-

APPENDIX "B"

JUDGE FREEMAN'S CHARGE TO THE JURY:

Members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to decide or to recommendto the Court whether the defendant should be sentenced to death or to life imprisonment. Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will be required to imoose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will be required to impose a sentence of imprisonment in the State's prison for life.

All of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing proceeding any evidence which was submitted during the guilt phase of this case. All of the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment. EXCEPTION NO. 71 he objection STATED AT TRIAL

It is now your duty to decide from all the evidence presented in both phases what the facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or as you might like

it to be. This is important because justice requires that everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner, and have the same law applied to him.

You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial, these tests may include: the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he testified; the manner and appearance of the witness; any interest, bias, or prejudice the witness may have; the apparent understanding and fairness of the witness, whether his testimony is reasonable; and whether his testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable evidence in the case.

I charge that for you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or the lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things.

First, that one or more aggravating circumstances existed. Second, that any mitigating circumstances you have found are insufficient to outweigh any aggravating circumstances you have found. Third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances you have found. EXCEPTION NO. 7

...3 CORRECTION STATED AT TRIAL

If you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to recommend that the defendant be sentenced to life imprisonment.

When you retire to deliberate your recommendation

as to punishment, you will take with you a form entitled, "Issues and Recommendation as to Punishment." This form contains a written list of four issues relating to aggravating and mitigating circumstances. I will now take up these four issues with you in greater detail, one by one. To enable you to follow me more easily, I'm going to have the bailiff give each of you a copy of the form entitled "Issues and Recommendation as to Punishment," which you will take with you when you retire to deliberate. Do not read ahead on this form, but if you will just refer to it as I instruct you on the law. So, Sheriff, if you will step up here please, I believe we have thirteen copies of this. Did everybody get a copy? The alternate has one too I believe.

All right. Issue Number One is, "Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?" There are two possible aggravating circumstances that are listed on the form, and you should consider each of them before answering Issue Number One.

The State of North Carolina must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance, and, before you may find any aggravating circumstance, you must agree unanimously

that it has been so proven. An aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law. Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as aggravating circumstances. Under the evidence in this case two possible aggravating circumstances may be considered.

The following are the aggravating circumstances which might be applicable to this case.

The first is, "Had Dock McCoy been previously convicted of a felony involving the use of violence to the person?" And I instruct you that second degree murder is by definition a felony involving the use of violence to the person. A person has been previously convicted if he has been convicted and not merely charged, and if his conviction is based on conduct which occurred before the events out of which this murder arose. If you find from the evidence beyond a reasonable doubt that on or about 1952 Dock McCoy -- (STRIKE THAT) -- If you find that on or about December the 22nd, 1984, that Dock McCoy had been convicted of second degree murder, and that he, Dock McCoy, killed Deputy Kress Horne, after he had committed the second degree murder,

EXCEPTION NO. 79 NO OBJECTION STATED AT TRIAL

you would find this aggravating circumstance, and would so indicate by having your foreman write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreman write, "No." in that space.

EXCEPTION NO. 79-A

Now, the second possible aggravating circumstance is, "Was this murder committed against a deputy sheriff while engaged in the performance of his official duties? A murder is so committed if, at the time the defendant kills the victim, the victim is a deputy sheriff and is at that time engaged in the performance of an official duty. An official duty is anything which is necessary for a deputy sheriff to do in his capacity as a deputy sheriff. If you find from the evidence beyond a reasonable doubt that when Dock McCoy killed Deputy Kress Horne, that Kress Horne was a deputy sheriff and at that time was answering a disturbance call pursuant to a dispatch to the Sheriff's Department and that this was among the official duties as a deputy sheriff, you would find this aggravating circumstance, and would so indicate by having your foreman write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a

EXCEPTION NO. 80 NO OBJECTION STATED AT TRIAL

NO OBJECTION STATED AT TRIAL EXCEPTION NO. 81

reasonable doubt as to one or more of these things, you will not find this aggravating circumstance,and will so indicate by having your foreman write, "No," in that space.

Now, if you unanimously find from the evidence beyond a reasonable doubt that one or more of these aggravating circumstances existed, and have so indicated by writing, "Yes," in the space after one or more of them on the "Issues and Recommendation" form, you would answer Issue One, "Yes." If you do not unanimously find from the evidence and beyond a reasonable doubt that at least one of these aggravating circumstances existed, and if you have so indicated by writing, "No," in the space after both of them on that form, you would answer Issue Number One, "No." If you answer Issue Number One, "No," you would skip Issues Two, Three and Four and you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue Number One, "Yes," then you would consider Issue Number Two.

Issue Number Two is, "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" Eight possible mitigating circumstances are listed on this form, and you should consider each of them before answering Issue Number Two.

A mitigating circumstance is a fact or group of facts, which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders. Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence which you deem to have mitigating value.

Now, the defendant, Dock McCoy has the burden of persuading you that a given mitigating circumstance exist. The existence of any mitigating circumstance must be established by a preponderance of the evidence. That is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exist. You would find that circumstance if the evidence satisfies you that a mitigating circumstance exist. If not, you would not find it. But in either event, you would move on to consider the other mitigating circumstances and continue

EXCEPTION NO. ___ NO OBJECTION STATED AT TRIAL

in a like manner until you have considered all of the mitigating circumstances listed on the form and any others that you deem to have mitigating value.

It is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

Number one, consider whether this murder was committed while Dock McCoy was under the influence of mental or emotional disturbance. A defendant is under such influence if he is in any way affected or influenced by a mental or emotional disturbance at the time he kills. Being under the influence of mental or emotional disturbance is similar but not the same as being in the heat of passion upon adequate provocation. A person may be under the influence of mental or emotional disturbance even if he had no adequate provocation and even if his disturbance was not so strong as to constitute heat of passion or preclude deliberation. For this mitigating circumstance to exist, it is enough that the defendant's mind or emotions were disturbed from any cause and that he was under the influence of the disturbance when he killed Kress Horne. You would find this mitigating circumstance if you find that the defendant suffered from personality and adjustment disorders, and that as a result Dock McCoy was under the influence of

mental or emotional disturbance when he killed Kress Horne and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the second mitigating circumstance that you should consider is whether the capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that he is -- or to know that what he is doing at a given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing, or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did

appreciate the criminality of his conduct, if his capacity to conform to the law is impaired, since a person may appreciate that the killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of intoxication, or mild mental retardation, or personality disorder, or adjustment disorder, is lessened or diminished because of such intoxication, or mental or emotional disorder, or borderline intelligence. You would find this mitigating circumstance if you find that Dock McCoy drunk a quantity of whiskey during the hours of the killing or that he suffered from adjustment, or personality disorder, or that he had borderline mental deficiency, and that this impaired his ability -- (STRIKE THAT) -- and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the third possible mitigating circumstance

that you should consider is whether the age of Dock McCoy at the time of this murder is a mitigating factor. The mitigating effect of the age of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence, and would so indicate it by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the fourth mitigating circumstance that you should consider is that whether for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated. Now, the mitigating effect of this circumstance is for you to determine from all of the facts and circumstances which you find from the evidence and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you would so indicate by having your foreman write, "No," in that space.

Now, the fifth mitigating circumstance that you

should consider is whether Dock McCoy has borderline intellectual functioning with a I.Q. test score of 74. And the mitigating effect of the defendant's I.Q. is for you to determine from all of the facts and circumstances which you find from the evidence and which -- and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the sixth, consider whether Dock McCoy's mental and emotional disturbances -- whether his mental and emotional disturbance is aggravated by his poor physical health. And the mitigating effect of the aggravation of his poor mental health is for you to determine from all of the facts and circumstances which you find from the evidence, and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issue and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you would so indicate it by having your foreman write, "No," in that space.

Now, number seven, you should consider whether

Dock McCoy's ability to remember the events of December the 22nd, 1984, is actually impaired. The mitigating effect of the impaired memory of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write, "No," in that space.

Now, number eight, you should consider whether Dock -- Number eight, you should finally consider whether any -- consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value. If you do unanimously so find by a preponderance of the evidence, you will so indicate by having your foreman write, "Yes," in the space after the mitigating circumstance on the "Issue and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write, "No," in that space. If you unanimously find by a preponderance of the evidence one or more mitigating circumstances and have so indicated by writing, "Yes," in the space after one or more of them

on the "Issues and Recommendation" form, you would answer Issue Number Two,"Yes." If you do not unanimously find by a preponderance of the evidence that at least one of these mitigating circumstances existed, and if you have so indicated by writing, "No," in the space after every one of them on that form, you would answer Issue Number Two, "No." If you answer Issue Number Two, "Yes," you must consider Issue Number Three. If you answer Issue Number Two, "No," you will not answer Issue Three. Instead, skip Issue Three and answer Issue Four.

Now, Issue Number Four -- excuse me, Issue Number Three is, "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?" If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating

EXCEPTION NO. 83 NO OBJECTION STATED AT TRIAL

circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the mitigating circumstances outweigh the aggravating circumstances.

EXCEPTION NO. 84 NO OBJECTION STATED AT TRIAL

If you unanimously find, beyond a reasonable doubt, that the mitigating circumstances found by you are insufficient to outweigh the aggravating circumstances found by you, you would answer Issue Three, "Yes." If you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three, "No." If you answer Issue Three, "No," it will be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three, "Yes," you must consider then Issue Number Four.

Issue Four is, "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you. In deciding this issue you're not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable

doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue, "Yes." In so doing, you're not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of the other kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasion -- persuasiveness of the existing aggravating and mitigating circumstances in making this determination.

NO OBJECTION STATED AT TRIAL BY ... NO. 86

You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared to the totality of the mitigating circumstances found by you. After so doing, if you're satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, it would be your duty to answer the issue, "Yes." If you are not so satisfied or have a reasonable doubt, it will be your duty to answer the issue, "No." In the event you do not find the existence of any mitigating circumstances, you must still answer this issue. And in such case you must

EXCEPTION NO. 3 NO OBJECTION STATED AT TRIAL

determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, of significance as to be sufficiently substantial to call for the imposition of the death penalty. Substantial circumstances may be contrasted with circumstances that are flimsy, abstract, imaginary, accepted or negligent. Substantial means having substance or weight, important, significant or momentous.

Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence, beyond a reasonable doubt, the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue Four, "Yes," you must agree unanimously that they are. If you answer Issue Four, "No," you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue Four, "Yes," it would be your duty to recommend that the defendant be sentenced to death.

EXCEPTION NO. 87 NO OBJECTION STATED AT TRIAL

Now, members of the jury, you have heard the evidence and the arguments of counsel for both the State and for the defendant. I did not summarize the evidence,

but it is your duty to remember all of the evidence whether it's been called to your attention or not, and if your recollection of the evidence differs from mine or that of the District Attorney, or that of the defense attorney, you are to rely solely upon your own recollection of the evidence in your deliberations. I did not review the contentions of the attorneys in their speeches to you, but it is your duty not only to consider all the evidence, but also to consider all the arguments, the contentions and positions argued by the State's attorney and the defendant's attorney in their speeches to you, and any other contention that arises from the evidence, and to weigh them in the light of your common sense, and to make your recommendation as to punishment.

Now, the law, as indeed it should, requires the presiding judge to be impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice or expression on my face, or any question I may have asked a witness, or anything else that I may have said or done during this trial, that I have an opinion or have intimated an opinion, as to whether any part of the evidence should be believed or disbelieved, as to whether any aggravating or mitigating circumstance has been proved or disproved, or as to what your recommendation ought to be. It is your exclusive province

to find the true facts of the case and to make a recommendation reflecting the truth as you find it.

Now, when you're ready to make your recommendation, have your foreman write in your recommendation as directed on the "Issues and Recommendation" form.

At this time I will ask all of you just to pass those forms back to the bailiff. We will take all of those up and then I'll give you one.

Have you got all thirteen?

THE BAILIFF: Yes, sir.

THE COURT: Everybody gave them to the Sheriff, I assume? All right, at this time I will excuse the alternate juror. You can just sit right there until they go back. Sir, when they go back to deliberate, you are excused and I thank you for serving. You're certainly welcome to wait if you want to, have a seat out there, and you can wait and see what your fellow jurors do, or if you would like to go home, you're excused to go home.

Now the rest of you, if you will retire to the jury room. You should first select one of your members to serve as foreman to lead you in your deliberations. Do not begin your deliberations until you receive the written form from the bailiff, and you will proceed immediately with the selection of your foreman. And then after you receive the written form, proceed with your

deliberations. When you've reached a unanimous decision on the "Issues and Recommendation" and are ready to pronounce it, and your foreman has written the answers on the form, have your foreman sign and date it, notify the bailiff by knocking on the door of the jury room, and you will be returned to the courtroom to pronounce your answers to the "Issues and Recommendation". If you will step back to that room now and proceed with the selection of a foreman.

(The jury leaves the courtroom at approximately 3:40 p.m.)

THE COURT: All right. Before I send the "Issues and Recommendation" form to the jury and let them begin their deliberations I'll consider any request for corrections or additional matters that anyone feels necessary or appropriate to submit a proper charge to the jury. Any for the defense?

MR. STOKES: No, sir.

THE COURT: Any for the State?

MS. WALLACE: No, sir.

THE COURT: All right. Mr. Sheriff, if you will give them that form, please.

(The jury returns to the courtroom at approximately 5:23 p.m.)

THE COURT: Who is the foreman?

THE FOREMAN: (Walter Wild) - I am.

THE COURT: Do y'all have a question, sir? Is that it?

THE FOREMAN: Yes, sir. We're a little confused on Issue Two, Question Two. Is it a two-part question? Can you fully explain it?

THE COURT: You can have a seat. Are you talking about the mitigating circumstance which reads, whether the capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Is that what you're talking about? You question is whether that's a two-part question?

THE FOREMAN: Is it a two-part question or can you explain it? The reason we think it's possibly a two-part question is because of the word "or".

THE COURT: Let me repeat this to you and see if this clears it up. On this question, you are to consider whether the capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that what he is doing at a given time is killing

or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing, or how wrong it is. Further, for this mitigating circumstances to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did appreciate the criminality of his conduct, if his capacity to conform to the law is impaired, since a person may appreciate that the killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of intoxication, or mental retardation, or personality disorder, or behavioral deficiency is lessened or diminished because of such impairment. You would find this mitigating factor if you find that Dock McCoy consumed a large quantity of whiskey during the hours before the killing or that he suffered from mild mental retardation, or he suffered from the emotional or mental disturbances, or defiencies, and that this impaired his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements

of the law, and you would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write, "No," in that space. Now, do you think that answers your question?

THE FOREMAN: Yes.

THE COURT: All right. If you will step back there and resume your deliberations.

(The jury retires to the jury room at approximately 5:30 p.m.)

THE COURT: Any objection to that additional instruction or any request for anything further or corrections?

MR. STOKES: No, sir.

THE COURT: Let the record show there's none from the defendant and none from the State. We will stand at ease for awhile.

(The jury returns to the courtroom at approximately 6:17 p.m.)

THE COURT: All right. Mr. Foreman, I certainly don't want to know how your deliberations are going or what your count is, or anything of that nature, but it is 6:15. Do y'all feel like that if you were

allowed to deliberate a little bit longer today you could reach a verdict or had you rather come back tomorrow.

THE FOREMAN: I believe we can reach it today, Your Honor, in a reasonable amount of time.

THE COURT: You understand I'm certainly not rushing you. You have all day tomorrow and the next day if you need to take that much time. If you will step back there and resume your deliberations. If you come to the point where you think it's going to take a considerable more amount of time, you might knock on the door and tell the sheriff, and we will let you come back tomorrow. Step back there and resume your deliberations.

(The jury retires to the jury room at approximately 6:17 p.m. and returns to the courtroom at approximately 6:25 p.m.

THE COURT: Mr. Foreman, have you reached a verdict?

THE FOREMAN: No, sir. We would like to request one more day.

THE COURT: All right. Would you give that verdict sheet to the bailiff there and we will have that sealed and put in an envelope. Members of the jury, I am going to let you go home. Let me caution you again, as I've done a number of times, -- give it to the Clerk

there and if you will seal that in an envelope. Let me caution you, as I've done a number of times, it is extremely important. Do not talk about this case among yourselves, don't talk to anybody at home about it, don't talk to anybody or carry on any conversation at all with anybody involved in the case. Don't regard it on any news media and don't let anybody tell you what they might have heard or read about it, and don't make any independent study or investigation on your own. If anybody tries to talk with you about this case, just report that to the Court at your earliest convenience. Given the lateness of the hour, I might let you come in at ten o'clock in the morning. If you will be back in here at ten o'clock and just report right directly to that jury room, but do not begin your deliberations until all twelve jurors are present. Once all twelve of you are here, the sheriff will bring you that verdict sheet back to you and then you can begin your deliberations. So everybody will just remain seated until the jury can get out on the elevator.

RECESS.

DATE: August 8, 1985.

THE COURT: Why don't you bring all the jurors out here and let me make sure they are not deliberating any.

(The jury returns to the courtroom from the jury room.)

THE COURT: Good morning, members of the jury. I assume none of you heard anything or read anything about this case in any of the news media. I believe when you left yesterday your foreman had informed me that you have so far been unable to agree on a verdict. I want to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your differences if you can without the surrender of conscientious conviction, but no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict. I will let you resume your deliberations and see if you can reach a verdict. If y'all will step back there, please. Sheriff, if you will give that to the foreman, please.

EXCEPTION NO. 88 NO OBJECTION STATED AT TRIAL

(The jury retires to the jury room at approximately 10:12 a.m. and returns to the courtroom at approximately 11:15 a.m.)

THE COURT: Mr. Foreman, I believe you have reached a unanimous verdict, is that correct?

THE FOREMAN: Yes, Your Honor.

THE COURT: Would you hand that verdict sheet to the sheriff, please. Now, members of the jury, your

foreman has returned in open court a unanimous verdict, answering the first issue, "Yes," the second issue, "Yes," the third issue, "Yes," the fourth issue, "Yes," and recommended as its punishment that the defendant, Dock McCoy, be sentenced to death. Is that your verdict so say you all.

(All jurors indicate affirmatively.)

THE COURT: I assume you want to poll the jury.

MR. STOKES: I want to poll the jury.

THE COURT: Mr. Foreman, would you stand up, please? Mr. Foreman, you have returned a verdict of guilty -- well, you've returned a verdict of answering all four issues, "Yes," and recommending that the defendant be sentenced to death. Is this your verdict?

THE FOREMAN: (Walter H. Wild) - Yes, Your Honor.

THE COURT: Is this still your verdict?

THE FOREMAN: (Walter Wild) - Yes, Your Honor.

THE COURT: Thank you, sir. You may sit down. Juror Number One, Soyna Dial, would you stand up, please. Ma'am, your foreman has announced a verdict answering all four issues, "Yes," and recommending as its punishment death. Is this your verdict?

NORTH CARO[illegible] IN THE GEN[illegible]URT OF JUSTICE
STANLY COUNTY SUPERIOR[illegible]RT DIVISION
85-CRS-2617

STATE OF NORTH CAROLINA

VS.

DOCK McCOY, alias DOCK McCOY, JR., alias DOCK McKAY, alias PAUL McCOY,

Defendant.

ISSUES AND RECOMMENDATIO[illegible]

AS TO PUNISHMENT

ISSUES

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER YES.

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

1. Had Dock McCoy been previously convicted of a felony involving the use of violence to the person?

ANSWER YES

2. Was this murder committed against a deputy sheriff while engaged in the performance of his official duties?

ANSWER YES

IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE, AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE, "YES" PROCEED TO ISSUE TWO.

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STANLY CO.
By: Nancy Scott

Issue Two:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER YES.

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. WRITE, "NO," IF YOU DO NOT UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE TWO.

1. This murder was committed while Dock McCoy was under the influence of mental or emotional disturbance.

ANSWER NO

2. The capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER YES.

3. The age of Dock McCoy at the time of this murder is a mitigating circumstance.

ANSWER NO

4. That for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated.

ANSWER NO

5. That Dock McCoy has borderline intellectual functioning with a IQ test score of 74.

ANSWER YES

A TRUE COPY
CLERK OF SUPERIOR COURT
STANLY CO.
By: Nancy Scott

6. That Dock McCoy's mental and emotional disturbance is aggravated by his poor physical health.

ANSWER NO.

7. Dock McCoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

ANSWER NO

8. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER NO

ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO, "YES." IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

Issue Three:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER YES.

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

A TRUE COPY
CLERK OF SUPERIOR COURT
STANLY COUNTY
By: Nan Dalton

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER YES

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE FOUR "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Dock McCoy, be sentenced to DEATH.

This the 8 day of AUGUST, 1985.

Walter N. Wild (signature)
FOREMAN OF THE JURY

A TRUE COPY
CLERK OF SUPERIOR COURT
STANLY COUNTY
By: Nan Dalton

APPENDIX "C"

FILED
1988 OCT -6 AM 10 39
IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
)
v.) No. 70A86 - Halifax
)
TIMOTHY LANIER ALLEN)

Appeal by defendant from a death sentence imposed by Pope, J., at the 4 November 1985 Criminal Session of Superior Court, Halifax County. The defendant's motion to bypass the Court of Appeals was allowed in those cases in which sentences of less than life were imposed. Heard in the Supreme Court 11 April 1988 and 22 August 1988.

The defendant was tried and convicted on three counts of felony possession of stolen property and one count of first degree murder for the killing of Raymond E. Worley a member of the North Carolina State Highway Patrol. Evidence presented at trial tended to show the following: During the early morning hours of 14 May 1985, Mr. Worley was patrolling I-95 in Halifax and Northampton counties. At approximately 5:11 a.m. Mr. Worley radioed his dispatcher that he was stopping two vans with Maryland license tags just north of Highway 561. No further radio communication from Mr. Worley was received. A short time later, pursuant to a request from the dispatcher at the Enfield Police Department, Don Davenport, a Division of Motor Vehicles enforcement officer, attempted to locate Mr. Worley. Davenport and Officer Cecil Austin drove approximately twelve miles up I-95 where they spotted Mr. Worley's car sitting on the right hand side of the road near highway marker 163. They also observed a

white van parked in front of the patrol car. As they pulled up behind the patrol car, they noticed Mr. Worley sitting in the driver's seat and that the rear window was slightly fogged. The officers got out of their vehicles and approached the patrol car at which time they saw that the driver's side window of the car was shattered, and that Mr. Worley's body was leaning to the right with his head tilted downward. Blood covered Worley's shirt and was spattered across the right side of his head as well as on his right arm and leg. The officers checked for a pulse but there was none. Rescue vehicles were called and arrived on the scene shortly thereafter at which time Mr. Worley was pronounced dead. A crime scene investigation was begun, with photographs and fingerprints being taken. In addition, investigators found a .22 caliber pistol as well as an identification card of a black male, Antonio Worrell.

An autopsy revealed that Mr. Worley had suffered three gunshot wounds. One shot entered behind the right ear and traveled through the neck, finally lodging in the left back behind the armpit. Another bullet entered the right shoulder and lodged near the right base of the neck. A third bullet hit the middle finger of the left hand.

Dr. John Butts, Associate Chief Medical Examiner for Halifax County, testified that due to massive blood loss Mr. Worley probably lost consciousness within a minute and died three to four minutes after the shooting. Dr. Butts further testified that Mr. Worley's lungs were hyperinflated due to blood rushing into the airways, essentially drowning him in his own blood. The

bullets found in the body were those of a .38 caliber pistol, which were subsequently compared with the gun found on Alex Allen.

At approximately 6:02 a.m. on 14 May 1985, Sergeant Everett Horton, of the North Carolina State Highway Patrol, received a call about Mr. Worley. He immediately began organizing a manhunt and alerted law enforcement officials from the surrounding counties.

The authorities subsequently received a report of an abandoned black van near the intersection of Highway 903 and U.S. 301 and a man walking down U.S. 301 near where the van had been abandoned. Around 6:20 a.m., E. D. Marshman, a member of the Highway Patrol, left his home off Highway 301 and began listening to radio accounts of the murder. He then observed a man matching the description of the man seen leaving the van walking along the highway. Marshman pulled up behind the man, subsequently identified as co-defendant Alex Allen, and ordered him to lie on the ground where he handcuffed him and placed him in custody. A subsequent search of Alex Allen revealed a .38 caliber pistol.

Around 7:15 a.m. on 14 May 1985, law enforcement officers tracked a group of three men to an abandoned house where they were arrested and taken into custody. The three were subsequently identified as Antonio Worrell, Mack Greene, and the defendant, Timothy Allen.

The co-defendants were transported back to the Halifax County Sheriff's Department. After interrogating defendants Worrell, Greene, and Alex Allen, E. C. Warren, a detective with

the Halifax County Sheriff's Department, began interrogating the defendant, Timothy Lanier Allen. At 1:50 p.m., the defendant was brought into an interview room where his Miranda rights were read to him, after which a waiver was obtained and interrogation begun. The defendant ultimately confessed to the murder.

In his confession, the defendant stated that on 11 May 1985 he left Washington, D.C. with Alex Allen, Antonio Worrell and Mack Greene in a black van stolen in Maryland. They traveled to Wallace, North Carolina, where they stayed with friends until around midnight on 13 May 1985. At that time they made plans to return to Washington, D.C. On the way they broke into a store located near Ivanhoe on N.C. 421 in Pender County, stealing beer, cigarettes and .22 and .38 caliber pistols. The defendant kept the .38 pistol and gave the .22 pistol to co-defendant Worrell and they continued their trip, stopping again along the road to steal a white van from a car lot. The defendant and Alex Allen got into the white van and followed Worrell and Greene in the black van.

As the group proceeded toward Washington, a patrol car pulled around the van driven by the defendant and stopped the van driven by Worrell. At that time the defendant pulled his van in behind the patrol car and parked on the shoulder of the highway. The defendant stated that he observed Mr. Worley get out of the patrol car, speak to Worrell, and then Worrell follow the trooper back to the patrol car. Mr. Worley then motioned for the defendant to get out of the van and come to the patrol vehicle. As the defendant approached the car, Mr. Worley reached

over to unlock the door. At that time, the defendant fired at least twice at Mr. Worley. At that point, all the co-defendants fled the scene in the black van and were subsequently arrested after hiding near an abandoned house.

After giving his statement, the defendant read the written version and signed the statement as being the truth to the best of his knowledge and belief. This statement was introduced by the State and read into evidence at trial.

At the close of the State's evidence, the defendant took the stand and denied shooting Mr. Worley, stating instead that following a meeting at the patrol car between himself, Worrell and Mr. Worley, he returned to the black van to get his license when he heard shots fired. After Mr. Worley was shot, the defendant and his friends drove off.

The jury found the defendant guilty of first degree murder and three counts of felonious possession of stolen property. After a sentencing hearing the jury recommended the death penalty which was imposed. The defendant appealed.

LACY H. THORNBURG, Attorney General, by ISAAC T. AVERY, III, Special Deputy Attorney General, H. JULIAN PHILPOTT, JR., Associate Attorney General, JAMES J. COMAN, Senior Deputy Attorney General, WILLIAM N. FARRELL, JR., Special Deputy Attorney General, and JOAN H. BYERS, Special Deputy Attorney General, for the State.

ANN PETERSON and GEOFFREY C. MANGUM, for defendant appellant.

E. ANN CHRISTIAN and ROBERT E. ZAYTOUN, for North Carolina Academy of Trial Lawyers, amicus curiae.

JOHN A. DUSENBURY, JR., for North Carolina Association of Black Lawyers, amicus curiae.

WEBB, Justice.

By his first assignment of error the defendant contends that the trial court erred in refusing to grant his motion to suppress his confession made by him on the day of his arrest. The defendant advances three different arguments as to why his confession should have been suppressed. He says first, pursuant to Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, reh. denied, 452 U.S. 973, 69 L.Ed.2d 986 (1981), his in-custody statement should have been suppressed due to a failure to stop interrogating him when he invoked his right to counsel. He also says he was not taken before a magistrate without unnecessary delay as required by N.C.G.S. § 15A-501(2). The third reason the defendant advances as to why his confession should have been suppressed is that considering the totality of the circumstances the State did not show the confession was voluntary.

The defendant made a motion to suppress his confession and a hearing was had before trial. There was testimony at this hearing by William A. Thompson, a special agent of the State Bureau of Investigation that he and E. C. Warren, a detective with the Halifax County Sheriff's Department, questioned the defendant in the interview room at the Sheriff's Department offices. The interview occurred at approximately 1:50 p.m. on 14 May 1985. Mr. Thompson testified that Mr. Warren read the defendant his constitutional rights to remain silent and to have an attorney. The defendant signed a written waiver of his constitutional rights and Mr. Warren confronted the defendant

with the evidence against him and attempted to interrogate him as to his part in the incident of that day. The defendant did not respond to Mr. Warren's questions until he was told of a statement by Antonio Worrell that the defendant had shot Mr. Worley. Mr. Thompson testified that at that point, "Timothy Allen stated something to the effect that if he made a statement that they would put him in the gas chamber -- or the electric chair, is what he said." At this point the defendant said he wanted to talk to a lawyer. The two officers stopped questioning the defendant and Mr. Warren told the defendant all he wanted was the truth, that the defendant would be returned to his jail cell and there would be no further interview with him. Mr. Warren also told the defendant that if he wished to have a further conversation he should call an officer. At that point Mr. Thompson suggested that if the defendant called for an officer he should ask for Mr. Warren. At this point the defendant said, "okay." The defendant then said, "I want to talk to you now, man." Mr. Warren then took the defendant's statement in which the defendant confessed to shooting Mr. Worley.

The court found facts consistent with the above evidence and concluded the defendant initiated the contact with the officers that led to his confession, and that he knowingly, voluntarily and intelligently waived his right to remain silent and his right to counsel. The court ordered the confession admitted into evidence. The court's findings of fact are supported by the evidence and the findings of fact support the conclusions. We will not disturb them.

In regard to the defendant's contention that the officers continued to interrogate him after he told them he wanted a lawyer, it is said in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378:

> [A]n accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. (Emphasis added.)

Id. at 484-485, 68 L.Ed.2d at 386. The defendant contends he did not initiate further communications after he asked for an attorney because the officers did not stop the interrogation. He says that Mr. Warren's statement that all he wanted was the truth, that the defendant would be returned to his cell and would have to contact the officers if he wanted to make a statement was a continuation of the interrogation. He also says, that when his request for counsel was met by "handcuffs and incommunicado incarceration, while ... inviting his last chance to tell his side of the story" he was cajoled into confessing.

We do not interpret the officers' statements as does the defendant. After he requested counsel the officers did not ask any further questions of the defendant. They told him of their availability if he changed his mind. We can find no coercion or pressure, nor was there any "functional equivalent" to questioning. See Rhode Island v. Innis, 446 U.S. 291, 64 L.Ed.2d 297 (1980). The fact that the defendant was to be handcuffed to be returned to his jail cell is not a continuation of the interrogation. We believe the facts found by the superior

court support the conclusion that the defendant of his own volition initiated the continuation of the interrogation.

For other cases in which we have held the defendant initiated contact with the officers after interrogation had been stopped, see State v. Nations, 319 N.C. 329, 354 S.E.2d 516 (1987); State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986); State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985); State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

The defendant argues that even if he initiated further communications with the officers the totality of circumstances surrounding the interrogation shows the waiver of his right to counsel and his other constitutional rights was coerced and without the requisite level of comprehension. He says this is so because of the massive show of force at the time of his capture, the fact that he was kept handcuffed in an isolated cell for several hours before interrogation, the jail was crowded with law enforcement officers, the failure of the officers to assist him when he requested counsel, the defendant's mental and physical condition at the time of his capture as a result of lack of sleep, being pursued by bloodhounds and helicopters for two or three hours and illness from drug withdrawal.

None of these factors necessarily prevented the defendant's waiver of his rights from being the product of a free and deliberate choice rather than from intimidation, coercion or deception. Nor did they necessarily prevent the defendant from waiving these rights with a full awareness both of the nature of the rights being abandoned and the consequences of the decision

to abandon them. The superior court so found and we are bound by its findings. Moran v. Burbine, 475 U.S. 412, 89 L.Ed.2d 410 (1986).

Finally the defendant argues there was an unnecessary delay in violation of N.C.G.S. § 15A-501 before taking him before a magistrate. In State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978), we held that a confession must be suppressed if there is a violation of N.C.G.S. § 15A-501 only if the confession was obtained as a result of the violation. In Richardson the delay in taking the defendant before a magistrate to advise him of his rights was substantially the same as in this case. We held this did not show the confession was obtained as a result of a violation of N.C.G.S. § 15A-501. There is nothing in the record in this case that shows the defendant's confession resulted from any delay in taking him before a magistrate.

The defendant's first assignment of error is overruled.

In his second assignment of error the defendant contends he must have a new trial pursuant to Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69 (1986), because he was denied equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 26 of the Constitution of North Carolina. In State v. Jackson, 322 N.C. 251, 368 S.E.2d 838 (1988), we faced a Batson question and said the following:

> In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712,, 90 L.Ed.2d 69, the United States Supreme Court overruled Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), and held a prima facie case of purposeful discrimination in the selection of

> a petit jury may be established on evidence concerning the prosecutor's exercise of peremptory challenges at the trial. In order to establish such a prima facie case the defendant must be a member of a cognizable racial group and he must show the prosecutor has used peremptory challenges to remove from the jury members of the defendant's race. The trial court must consider this fact as well as all relevant circumstances in determining whether a prima facie case of discrimination has been created. When the trial court determines that a prima facie case has been made, the prosecution must articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group. The prosecutor's explanation need not rise to the level of justifying a challenge for cause. At this point the trial court must determine if the defendant has established purposeful discrimination. Since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference. Batson, 476 U.S. 98, n. 21, 106 S.Ct. 1724, 90 L.Ed.2d 89, n. 21.

Id. at 254-255, 368 S.E.2d at 839-40.

In this case the jury before which the defendant was tried consisted of seven black persons and five white persons. Of the seventeen black veniremen tendered to the State (including alternates), it accepted seven or forty-one percent. In State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987), we held that the defendant did not make a prima facie case of racially motivated peremptory challenges when the State peremptorily challenged three of five black veniremen tendered to it. In State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), we held an inference that racially motivated peremptory challenges did not arise when the State peremptorily challenged six of the twelve black jurors tendered. In that case the State peremptorily challenged five

white jurors. We hold pursuant to Abbott and Belton that the defendant has not made a prima facie showing of racially motivated peremptory challenges when the State accepted seven of the seventeen black veniremen tendered and the majority of the jury which tried the defendant was black.

In his third assignment of error the defendant contends it was error to excuse a juror for cause based on her opposition to the death penalty. Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, reh'g. denied, 393 U.S. 898, 21 L.Ed.2d 186 (1968), held that a venireman may be excused for cause if he is irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings. During the examination of one of the jurors by the district attorney the following colloquy occurred:

> MR. BEARD: All right. And also because you are a nurse. Because of those things, it is your decision that you would not be able to recommend the death penalty in this particular case?
>
> MRS. ROOK: Yes, sir.
>
> MR. BEARD: We challenge for cause.

The defendant then was allowed to examine Mrs. Rook and the following occurred:

> MR. CHICHESTER: And if after you searched your heart and you went through the facts as you found them, and to pursuant to your duty as under, your -- ah, you match these facts with the law that her Honor gives you. And you came up with

death as an appropriate sentence. Would you be able to follow your oath and return a verdict of the death sentence?

MRS. ROOK: No, sir.

The court then asked the following question:

COURT: Is it your position that before the trial of this matter even begins, that you could not vote for the imposition of the death penalty? That is, the death sentence. No matter what the facts or circumstances may show?

MRS. ROOK: No, ma'am.

COURT: You could not do that?

MRS. ROOK: No, ma'am.

COURT: All right. Thank you. You may step down. That is for cause.

It is clear from the three answers Mrs. Rook gave that she was irrevocably committed not to vote for the death penalty. She was properly excused under Witherspoon.

The defendant contends that in Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985) and Adams v. Texas, 448 U.S. 38, 65 L.Ed.2d 581 (1980), the United States Supreme Court clarified the law so that the test now is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Under this test the juror was properly excused. The defendant argues that the answer the juror gave the court was equivocal, that is that "it is unclear whether Mrs. Rook's '[n]o' answer was '[n]o' she would not under any circumstances vote for the imposition of the death penalty or '[n]o' it is not her position that she would

not vote for the death penalty no matter what the facts or the circumstances were." We believe it is clear from the three answers given by Mrs. Rook that she was irrevocably committed not to vote for the death penalty.

In his fourth assignment of error the defendant contends that the State's use of peremptory challenges to remove jurors who were not disqualified under Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, but who wavered in their ability to impose the death penalty violated his constitutional rights. The defendant contends the Eighth Amendment proscription of cruel and unusual punishment and the Fourteenth Amendment's due process clause require that the defendant have a jury that is not stacked against him. He says that allowing peremptory challenges to such veniremen results in a jury that does not reflect a cross section of the community and violates his rights under the United States Constitution. The defendant relies on Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69 and Gray v. Mississippi, 481 U.S. ___, 95 L.Ed.2d 622 (1987), to support this argument.

Neither Batson nor Gray dealt with the prosecution's use of peremptory challenges to jurors who were not disqualified under Witherspoon, but who wavered in their ability to impose the death penalty. Batson dealt with peremptory challenges used in a racially discriminatory manner. It does not preclude the use of peremptory challenges in any other context. Gray dealt with the erroneous allowance of a challenge for cause. The Court recognized that prosecutors often exercise peremptory challenges to excuse jurors who are hesitant in voting for the death penalty

but may not be challenged pursuant to Witherspoon and the courts do not review this reason for exercising a peremptory challenge. Gray v. Mississippi, 481 U.S. ___, 95 L.Ed.2d 622. In State v. Robbins, 319 N.C. 465, 356 S.E.2d 279 (1987), we said the prosecution can take into account concerns expressed about capital punishment when exercising peremptory challenges. Id. at 494, 356 S.E.2d at 297. We hold it was not error under the Constitution of the United States for the prosecution to use its peremptory challenges to excuse veniremen who had qualms about the death penalty but were not excludable pursuant to Witherspoon.

The defendant argues further that if we hold it did not conflict with the United States Constitution for the State to use peremptory challenges to strike veniremen with qualms about the death penalty, it nevertheless violates Article I, Sections 19 and 24 of the Constitution of North Carolina. We hold that for the same reasons this does not violate the United States Constitution, it does not violate the North Carolina Constitution.

The defendant next assigns error to what he contends was the deprivation of his right to be present at every stage of the trial. During a weekend while the trial was in progress a television station broadcast a news report in which it was said that Mr. Worley's widow did not care or did not want the death penalty imposed on the defendant. In order to be certain the jury was not tainted by this television broadcast the court examined each of the jurors and alternates in her chambers with

only a court reporter present. Following the examination of each of the jurors the court reported to the parties what was said. A transcript of the proceedings was made available to the parties. One of the alternate jurors told the judge that her husband had been in an automobile accident and she had driven to the scene to pick him up. She said her husband told the highway patrolman at the accident scene not to talk to her because she was on the jury. She said she was very cautious at the scene of the accident not to talk to the patrolman.

The defendant, relying on State v. Payne, 320 N.C. 138, 357 S.E.2d 612 (1987), argues that his constitutional right to be present at every stage of the proceeding was violated. He says the State cannot show this was harmless error because there is no way of telling what information he could have obtained from the juror as to her contact with the patrolman had his attorney been present when she was examined by the court in chambers. This juror told the court that during a recess in the trial she drove to the scene of an automobile accident in which her husband had been involved. Her husband told the highway patrolman at the scene not to speak to his wife because she was on the jury. She said she was careful not to speak to the patrolman at the scene. The defendant has not shown us and we can think of no facts which would shed additional light on the question of the influence of the patrolman on the juror. It is clear that the juror had no real contact with the patrolman. We hold that any error which may have been committed by the court was harmless beyond a reasonable doubt. State v. Taylor, 280 N.C. 273, 185 S.E.2d 677 (1972). See N.C.G.S. § 15A-1443(b) (1983).

In his sixth assignment of error the defendant argues it was error to remove one of the jurors during the trial and replace her with an alternate juror. When the court was examining the jurors as to whether they had seen the television program about the trial, it was discovered that a Mrs. Johnson who was on the jury had heard the case discussed by her fellow workers. She had worked at Stephens Textiles for three years and four months and worked on one weekend during the trial. While she was working that weekend, she took a break with approximately seven of her co-workers. She viewed them as her "working partners." During the break two people discussed the case in her presence for ten to fifteen minutes. The discussion was about the trial in general. One of the persons said she did not think the defendant could get a fair trial in Halifax County. After this was said Mrs. Johnson left the room. Mrs. Johnson had been instructed by the court not to discuss the case with anyone or to let the case be discussed in her presence. Based on this information the court excused Mrs. Johnson and replaced her with the alternate who had picked up her husband after he had an accident.

In State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979), it was obvious on a Friday that the case could not be completed that day. The court asked the jury if they could continue on Saturday and one member of the jury said she could not. The court then removed that juror and substituted an alternate. In holding there was no error we said:

> The trial judge has broad discretion in supervising the selection of the jury to the end that both the state and defendant may receive a fair trial.... This discretionary power to regulate the composition of the jury continues beyond empanelment.... These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error. (Citations omitted.)

Id. at 593, 260 S.E.2d at 644. If it was not an abuse of discretion to remove a juror in Nelson in order to keep the trial from going into the next week, then it was not an abuse of discretion here to remove a juror who had heard other people discuss the case; and we so hold. See also State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, ___ U.S. ___, 100 L.Ed.2d 935 (1988) and State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

In his seventh assignment of error the defendant argues it was error to allow Mr. Worley's widow to testify as to her feelings when she heard of the shooting. During Mrs. Worley's testimony the prosecuting attorney asked her how she felt when she heard her husband had been killed. Over the defendant's objection Mrs. Worley testified, "I was hurt and I was mad; disgusted." The defendant argues that this evidence was irrelevant on any issue in the case and its sole tendency was to inflame the jury on both the guilt and penalty phase of the trial. The defendant cites Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440 (1987), for the proposition that the emotional impact on the family may not be considered in the penalty phase of a capital case. We hold that if this testimony was admitted in

error it was harmless beyond a reasonable doubt. It is hard to believe any juror would not know without this testimony that Mr. Worley's wife would be at least hurt, mad and disgusted when she heard he had been killed. The defendant could not have been prejudiced by the admission of this evidence.

In his eighth assignment of error the defendant contends it was error to allow a .38 caliber pistol to be passed among the jury and tested by the members of the jury as to its pull for single and double action. The pistol had been identified as the weapon with which Mr. Worley was shot and it was introduced into evidence. We are bound by State v. Walden, 311 N.C. 667, 319 S.E.2d 577 (1984), to overrule this assignment of error. In Walden a shotgun was introduced into evidence and the court instructed the jury as follows: "[y]ou may look at the weapon, if you like, and use the hammer to cock it, if you desire." Id. at 675, 319 S.E.2d at 582. In finding no error we said, "[w]e can see no reason why a prosecutor should not be allowed to suggest to a jury how it should examine real evidence, so long as he does not give his opinion as to the proof of a fact or state facts not in evidence." Id. at 676, 319 S.E.2d at 583.

The defendant, relying on State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979); State v. Hunt, 80 N.C. App. 190, 341 S.E.2d 350 (1986); and State v. Graham, 38 N.C. App. 86, 247 S.E.2d 300 (1978), argues that the conditions under which the jury was allowed to experiment with the weapon were different from the conditions under which the pistol was allegedly fired on the roadside. In Mayhand we found no reversible error in

allowing a prosecuting witness to sit in the lap of an officer to demonstrate the position she was in when she was raped. In Graham the Court of Appeals ordered a new trial when a prosecutor put a shirt, worn by the defendant at the time of the alleged shooting, in front of a defendant and directed him to cut the shirt with a knife. In Hunt the Court of Appeals found no error when a police officer, who testified he was not an expert, was allowed to demonstrate the operation of the weapon allegedly used in an assault and give his opinion that the gun would not fire unless the hammer was cocked and the trigger pulled.

In Hunt, Judge Becton, writing for the panel, made a distinction between a demonstration and an experiment. He defined a demonstration as "an illustration or explanation, as of a theory or product, by exemplification or practical application." He defined an experiment as "a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried." Hunt, 80 N.C. App. at 193, 341 S.E.2d at 353. We believe the evidence challenged by this assignment of error is more in the nature of a demonstration than an experiment. We agree with Judge Becton that the test of the admissibility is as set forth in N.C.G.S. § 8C-1, Rule 403. If the evidence is relevant it will be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

The defendant next argues that the court committed reversible error by not intervening ex mero motu to stop certain

arguments by the prosecution to the jury at the guilt phase of the trial. Ordinarily, objection to the prosecutor's jury argument must be made prior to the verdict in order for the alleged impropriety to be reversible on appeal. State v. Brock, 305 N.C. 532, 290 S.E.2d 566 (1982). In the absence of such objection, we will review the prosecutor's argument to determine only whether it was so grossly improper that the trial court abused its discretion in failing to intervene ex mero motu to correct the error. We have said:

> "We have consistently held that counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case. Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. Even so, counsel may not employ his argument as a device to place before the jury incompetent and prejudicial matter by expressing his own knowledge, beliefs and opinions not supported by the evidence[.] It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence ... and, in cases of gross impropriety, the court may properly intervene, ex mero motu." (Citations omitted.)

State v. Williams, 314 N.C. 337, 358, 333 S.E.2d 708, 722 (1985) (quoting State v. Covington, 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976)).

State v. Jones, 317 N.C. 487, 500-01, 346 S.E.2d 657, 664-65 (1986).

The assistant district attorney appearing in this case argued:

> He will hide behind the Constitution of this country that protects all of us. Not just selected ones of us, but all of us. But it's not something for a criminal to hide behind.
>
> The Constitution of this land has been complied with. The judge has ruled on the admissibility of the confession, and it has come before you. The only thing left for you to decide right now is was it true.

The defendant argues that the prosecution invited the jury to disapprove of the defendant for relying on his constitutional rights. He says the State is not allowed to obtain a conviction by punishing a defendant for relying on his constitutional rights. The defendant relies on Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91 (1976), which holds that the defendant's silence after receiving Miranda warnings cannot be used against him and Griffin v. California, 380 U.S. 609, 14 L.Ed.2d 106 (1965), which holds the State cannot comment on the defendant's failure to testify. Doyle and Griffin deal with a specific constitutional right which would be infringed if comments are made about it. A general comment about constitutional rights as was made in this case does not rise to the same level. It is certainly not such a gross impropriety that the court should have intervened ex mero motu.

The defendant next says that by arguing that the judge had ruled upon the admissibility of the confession the assistant district attorney argued that the judge had held the confession was valid and the jury should accept this ruling as to the

validity of the confession. When the defendant challenged the confession the judge had to rule on its admissibility. When she ruled it was admissible the jury then had to pass on its truthfulness. This is what the assistant district attorney told the jury and it was not error for the court not to intervene.

The assistant district attorney also argued:

> [The defendant] was looking [out for] himself [by minimizing his culpability], the same as he had been when he went in there and said, "Well, I think maybe I need a lawyer." That was a feeler. That was, that was for number one, you put it out there and see how [the officers] react. Are they going to deal with me on this?

The defendant argues that the right to counsel was a constitutional right and the prosecution may not be allowed to characterize it as something nefarious. The manner in which the defendant delayed his request for an attorney could give rise to the inference for which the State argued. It was not error for the court not to intervene ex mero motu.

At one point the assistant district attorney argued, "[y]ou have to believe now, that this man is telling you the truth and these officers are the ones who made it all up." The defendant first argues that this shifts the burden of proof to the defendant because the prosecutor told the jury they would have to find the defendant guilty unless the defendant proved the officers were lying. He also says that it was not his contention that he did not tell the officers he shot Mr. Worley but that he had not been truthful when he told them he had done so. In many cases the outcome of a case depends on which of the witnesses is to be believed. It does not shift the burden of proof for an

attorney to argue to a jury that it should believe one witness rather than another. There was sufficient conflict in the testimony for the assistant district attorney to argue as she did.

The district attorney argued to the jury that the defendant's attorney had commented on the fact that the others involved in the incident with the defendant had not testified. The district attorney then told the jury that they would not survive in prison if they had testified against the defendant. The defendant contends the most likely reason they did not so testify was that they were afraid of implicating themselves and under no circumstances should the prosecutor have speculated on this matter which was not in evidence. The inference which the district attorney made was not so unreasonable that the court should have intervened ex mero motu and stopped the argument.

The defendant's ninth assignment of error is overruled.

In the tenth assignment of error the defendant argues it was improper for the district attorney to argue that the jury should consider the bravery of the law enforcement officers who captured the defendant before he could go into the jurors' homes or rob or hurt someone, that the widow of the deceased highway patrolman had done her painful duty by coming to court each day to see that justice was done, that the law enforcement officers across the state expected the jury to do its duty, and that unless the jury did its duty by recommending death, the jurors would be telling law enforcement officers that their lives and services were without value. One of the aggravating

circumstances to be considered in determining whether to impose the death penalty is that the person killed was a law enforcement officer in the performance of his official duty. N.C.G.S. § 15A-2000(e)(8) (1983). This argument was proper to focus the jurors' attention on this aggravating factor. It is not, as argued by the defendant, an appeal to the jury to impose the death penalty because that is what is desired by the public, an argument which we held to be improper in State v. Scott, 314 N.C. 309, 333 S.E.2d 296 (1985).

The district attorney argued at one point:

> First of all, the State has to prove the existence of some aggravating circumstances. Now, the aggravating circumstances that the State can submit to you are set out by statute. They were set out by the Legislature and they've been approved by the Supreme Court. These aggravating circumstances that will be submitted to you have already been set out in the statute but what you have to decide is whether ... these aggravating circumstances exist in this case. I'm confident that you will find that two aggravating circumstances do exist and two aggravating circumstances are all that will ... be submitted to you.

The defendant argues that because the district attorney said the two aggravating factors had "been approved by the Supreme Court," it conveyed to the jury the idea that the Supreme Court commended these aggravating factors to the jury. When read in context we believe this is not the reasonable interpretation. The district attorney told the jury the General Assembly had adopted these aggravating factors and this Court has held they are proper aggravating circumstances. It is the jury, however, which must determine whether they exist. We do not think this argument

misled the jury regarding the manner in which it was to consider this aggravating circumstance.

This assignment of error is overruled.

In his eleventh assignment of error the defendant contends the court should have submitted to the jury the statutory mitigating circumstance set forth in N.C.G.S. § 15A-2000(f)(6), that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. We dealt with this mitigating circumstance in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979). We said impaired mental capacity would exist "if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished)." Id. at 68, 257 S.E.2d at 613.

The defendant contends there was sufficient evidence of his impaired mental capacity to submit this mitigating factor to the jury. He says the evidence shows he was a heroin user and had taken a drug three or four hours before the shooting. There were beer cans found in the van in which the defendant was riding. Mr. Thompson testified that during the interrogation, the defendant said he had taken drugs the day before the shooting and "felt bad," although he was not experiencing withdrawal symptoms. The defendant testified he told Mr. Thompson that "he was experiencing withdrawal symptoms, was sick and requested a

doctor." A Dr. Brown was called to the jail because the defendant had vomited and may have had withdrawal problems. Dr. Brown testified that when he saw the defendant he did not notice any withdrawal symptoms but prescribed some medicine for heroin withdrawal. The defendant testified when asked if he was suffering withdrawal symptoms from heroin use, "[m]aybe at that particular moment, no, sir, but I had been feeling bad so I knew later on that I would be withdrawing, yes, sir." There was no expert testimony as to the defendant's diminished capacity.

The fact that defendant may have taken a drug several hours before the shooting or that he may have drunk some beer is not sufficient alone to show a diminished capacity to appreciate the criminality of the offense or to refrain from illegal conduct. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). The defendant has shown no more than this. It was not error not to submit this mitigating circumstance to the jury.

The defendant next contends it was error for the court to charge the jury that they must be unanimous before they could find a mitigating circumstance to exist. The defendant bases this assignment of error on Mills v. Maryland, ___ U.S. ___, 100 L.Ed.2d 384 (1988), which dealt with the finding by a jury of mitigating circumstances in a capital case. Oral arguments in this case were heard prior to the date of the decision of the United States Supreme Court in Mills. As a result of that decision we ordered that new briefs be filed and additional oral arguments made in this case. For the reasons expressed in State v. McKoy, ___ N.C. ___, ___ S.E.2d ___ (no. 585A85, filed 7 September 1988), we reject defendant's argument based on Mills.

The defendant also argues under separate assignments of error three issues which he recognizes have been determined against his position in previous cases. He asks that we find error because (1) he was not allowed to inform the jury that if they did not reach a unanimous verdict the defendant would be sentenced to life in prison, (2) he was denied a bill of particulars as to what aggravating circumstances would be submitted to the jury, and (3) the court submitted as aggravating factors that the murder was committed to avoid arrest and the murder was committed against a law enforcement officer in the performance of his duties. He contends these two aggravating factors are duplicative.

The defendant concedes this Court has rejected all three contentions in several cases including State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987) for his first contention, State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985) for his second contention, and State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981) for his third contention. We decline to overrule any of these cases.

PROPORTIONALITY REVIEW

Having determined there was no error in the guilt or penalty phase of the trial sufficient to require a new trial or sentencing hearing, we are required by N.C.G.S. § 15A-2000(d)(2) to determine (1) whether the record supports the jury's finding of the aggravating circumstance upon which the sentence of death was imposed, (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor,

and (3) whether the sentence is excessive or disproportionate to the penalty imposed in the pool of similar cases, considering both the crime and the defendant.

We have thoroughly examined the record, transcripts, and briefs in this case. We find that the record clearly supports the submission of the aggravating circumstances considered and found by the jury. Further, we find no indication at all that the death penalty was imposed under the influence of passion, prejudice or arbitrary factors.

We turn then to our final statutory duty of proportionality review. In dealing with a review as to whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant" in State v. Williams, 308 N.C. 47, 301 S.E.2d 335, cert. denied, 464 U.S. 865, 78 L.Ed.2d 177, reh'g denied, 464 U.S. 1004, 78 L.Ed.2d 704 (1983), this Court said it would use a "pool" of cases which included:

> [A]ll cases arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

Id. at 79, 301 S.E.2d at 355. This pool includes only those cases which this Court has found to be error free in both phases of trial. State v. Jackson, 309 N.C. 26, 45, 305 S.E.2d 703, 717 (1983).

In State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 86 L.Ed.2d 267 (1985), we said that in comparing a case with those in the pool, we would limit our consideration to those cases "roughly similar with regard to the crime and the defendant." We also said:

> If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

Lawson, 310 N.C. at 648, 314 S.E.2d at 503.

With the magnitude and seriousness of our task in mind, we have reviewed the facts and circumstances of this case and compared them to other cases in the proportionality pool. The distinguishing features of the present case are: (1) it is the first degree murder of a law enforcement officer while engaged in the performance of his duty; (2) it is a case in which the motive for the murder was to avoid lawful arrest; (3) it is a case in which the murder was preceded by a violent course of conduct (i.e., multi-state crime spree); and (4) it is a case in which the defendant appeared in control of his mental and physical faculties before, during, and after the killing and gave a knowing and voluntary confession thereto.

Our careful analysis of the pool reveals a total of seven cases in which a defendant was charged with the murder of a law enforcement officer. Those cases are State v. McKoy, ___

N.C. ___, ___ S.E.2d ___ (No. 585A85, filed 7 September 1988); State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988); State v. Rice, 322 N.C. 596, 369 S.E.2d 576 (1988); State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985); State v. Hill, 311 N.C. 465, 319 S.E.2d 163 (1984); State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983); and State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981). Of these seven cases, in three, Hutchins, Hill and McKoy, did the jury recommend death.

In State v. Hill, 311 N.C. 465, 319 S.E.2d 163, defendant was charged and convicted of the first degree murder of a Hendersonville police officer. Following the jury's recommendation and the trial court's sentence of death, this Court vacated the sentence holding it to be disproportionate pursuant to N.C.G.S. § 15A-2000(d)(2). In support of this decision, the Court in Hill cited the speculative nature of the evidence surrounding the murder, not only as to the defendant's whereabouts at the time of the murder but also as to what he might have been doing just prior to his encounter with the officer. Likewise, the Court cited the lack of evidence as to who drew the murder weapon out of the officer's holster. The Court in Hill further focused its attention on the failure to submit N.C.G.S. § 15A-2000(e)(4) (that the murder "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody") as an aggravating circumstance for the jury's consideration. Thus, given the speculative nature of the evidence surrounding the murder, the apparent lack of motive, and the short amount of time involved in the murder

itself, the Court in Hill ordered the defendant sentenced to life imprisonment in lieu of the death sentence.

In contrast to the holding in Hill, this Court in State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788, affirmed the trial court's sentence of death. Hutchins involved the murder of three law enforcement officers, two of which were first degree murder convictions. The jury found three aggravating factors: (1) that the murder was committed to avoid lawful arrest; (2) that the murder was committed against a law enforcement officer while engaged in the performance of his duties; and (3) the murder was part of a course of conduct involving crimes of violence. The Court further cited the clear evidence of guilt and the defendant's conduct and wanton disregard for the value of human life and for the enforcement of the law by duly appointed authorities.

As previously mentioned, defendant offered three other cases for our proportionality review as they relate to the case at bar: State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100, involved a conspiracy to commit an armed robbery by defendant and five other co-defendants. While defendants were committing the robbery, a law enforcement officer entered the store to make a purchase whereupon he was shot several times and left to die. Although finding four aggravating factors ((1) defendant had previous convictions of violent crimes, (2) the murder was committed to avoid arrest, (3) the murder was committed while engaged in an armed robbery, and (4) the murder was committed against a law enforcement officer while in the line of duty), the

jury refused to impose the death sentence. The defendant introduced evidence to cast doubt on the credibility of the co-defendants who turned State's evidence against defendant Abdullah. This was especially true in light of the jury's knowledge that the co-defendants received lesser sentences. Thus there appeared to be some residual doubt in the jury's mind which led to its refusal to impose the death penalty.

Likewise in State v. Payne, 312 N.C. 647, 325 S.E.2d 205 and State v. Bray, 321 N.C. 663, 365 S.E.2d 571, the participation in the crimes and subsequent testimony of the co-defendants cast some doubt as to whether the victims' deaths in each case were a result of the acts of one or several. We believe this degree of residual doubt necessarily influenced the jury's decision to recommend a life sentence in each case.

Considering all of the cases in the proportionality pool, but more specifically the aforementioned seven, we believe that the present case compares most favorably to Hutchins, while being distinguishable in several respects from Hill, Abdullah, Payne and Bray.

As previously mentioned, in Bray, Abdullah, and Payne, the evidence was far more equivocal as to the degree of the defendant's culpability than it is here. It was such that it could have created a residual doubt in the minds of the jury as to the defendant's culpability. Likewise in Hill, this Court voiced the same kind of doubt in setting aside the sentence of death in favor of that of life imprisonment. Although there is some evidence that one of defendant Allen's co-defendants in the

case at bar may have been involved in the actions at the patrol car, the evidence that the defendant was the person who pulled the trigger and killed Mr. Worley while he was in a defenseless position is relatively overwhelming. Any doubts to the contrary are largely dispelled by the voluntary and knowing confession of the defendant a short time after the events of 14 May 1985.

Thus, we hold that the case at bar aligns itself more closely with the facts and the defendant in Hutchins. In Hutchins, as in the present case, the defendant exhibited a course of conduct that was without regard for the law or its enforcement. This course of conduct culminated in the murder of a law enforcement officer while in the line of duty and was motivated by a desire to avoid or prevent an arrest (both factors being found by the jury as aggravating circumstances). In the present case, the killing was cold-blooded, unprovoked, and unjustified. The defendant, although not required to do so, stopped behind a highway patrolman, took a pistol from his van and as the trooper reached over in a defenseless position, shot him point blank three times resulting in the victim drowning in his own blood. This murder was the result of an intentional, knowing act of a responsible adult.

After a careful consideration of the briefs, transcripts, and record, we conclude that the sentence of death is not disproportionate or excessive, considering both the crime and the defendant. We therefore decline to disturb the sentence imposed.

NO ERROR.

No. 70A86 - State v. Allen.

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OF NORTH CAROLINA

Chief Justice EXUM dissenting as to sentencing.

The majority concludes the sentencing hearing jury instructions on the unanimity requirement do not violate the federal constitution as interpreted in Mills v. Maryland, 486 U.S. ___, 100 L.Ed. 2d 384 (1988), on the basis of this Court's decision on this issue in State v. McKoy, ___ N.C. ___, ___ S.E.2d ___ (No. 585A85, filed 7 September 1988). For the reasons stated in my dissenting opinion in McKoy, I disagree with this conclusion and vote, because of this error in the instructions, to give defendant a new sentencing hearing.

When the majority in McKoy concluded that Mills had no application to North Carolina's jury instructions on unanimity, it relied in part on the United States Supreme Court's having denied certiorari in two North Carolina cases in which these instructions formed the principal basis for the defendant's petition for the writ. The majority said:

> The Supreme Court granted certiorari in Mills "[b]ecause of the importance of the issue in Maryland's capital-punishment scheme." Id. at ___, 100 L.Ed. 2d at 393. The decision in Mills thus appears to be statute-specific. This conclusion is further supported by the Court's treatment of three cases immediately after the decision in Mills. The Court denied certiorari in two cases from this state which raised the issue of whether North Carolina's requirement of jury unanimity on the existence of mitigating circumstances is unconstitutional. See State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, ___ U.S. ___, 100 L.Ed. 2d 935 (1988); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1983), cert. denied, ___ U.S. ___, 100 L.Ed. 2d 934 (1988). However, in a Maryland case raising the same issue as in Mills, the Court granted certiorari, vacated the judgment, and remanded for further consideration in light of Mills. See Jones v. Maryland, 310 Md. 569, 530 A.2d 743 (1987), cert. granted and judgment vacated, ___ U.S. ___, 100 L.Ed. 2d 916 (1988). We recognize that "a denial of a petition for a writ of certiorari . . . carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." Maryland v. Baltimore Radio Show, 338 U.S. 912, 919, 94 L.Ed. 562, 566 (1950) (Frankfurter, J., opinion re: denial of certiorari); see also Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 944, 58 L.Ed. 2d 335, 336 (1978) (Stevens, J., opinion re: denial of certiorari). We do not suggest that the denial of certiorari in Holden and Gardner alone indicates that the Court decided that the defendants' arguments in those cases were without merit. However, we view the Court's action on Jones and its different treatment of Holden and Gardner, all in the immediate wake of Mills, as some indication that our capital-sentencing procedure differs sufficiently from Maryland's that Mills does not control the question presented here.

McKoy, slip op. at 53-54.

On 3 October 1988 the United States Supreme Court entered the following order in Oscar Lloyd v. North Carolina, No. 87-6833 (our State v. Lloyd, 321 N.C. 301, 374 S.E.2d 316 (1988)):

> The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of Mills v. Maryland, 486 U.S. ___ (1988).

This order was granted on the basis of (1) Lloyd's petition for writ of certiorari filed in April 1988 (before the decisions in Mills and McKoy), which relied solely on the assertion that North

Carolina's unanimity jury instructions for mitigating circumstances in capital cases violated Lloyd's Eighth and Fourteenth Amendment rights and (2) a supplemental brief filed in September 1988 calling the Court's attention to its decision in Mills and our decision in McKoy.

To the extent the McKoy majority relied for its conclusion on the United States Supreme Court's denial of petitions for certiorari in other North Carolina cases involving the unanimity jury instruction issue, that conclusion has been substantially undercut by the United States Supreme Court's action in Lloyd. The Lloyd order, considered with the filings upon which it rests, renders the conclusion reached in McKoy--that Mills has no application to North Carolina's unanimity jury instructions--far more untenable than it otherwise was.

I concur in the result reached by the majority on the guilt phase issues.

Justice Frye joins in this dissenting opinion.

NO. 88-5909

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM, 1988

DOCK McKOY, Petitioner, v. STATE OF NORTH CAROLINA Respondent.	)	AFFIDAVIT OF MAILING

STATE OF NORTH CAROLINA
COUNTY OF WAKE

JOAN H. BYERS, being sworn says:

1. I am a Special Deputy Attorney General for the State of North Carolina.

2. On January 30, 1989 I personally placed the original and nine copies of the enclosed brief of respondent State of North Carolina in opposition to petition for writ of certiorari to the Supreme Court of the United States in an envelope properly addressed to the Clerk of this Court, with first class postage prepaid, and deposited the envelope in a mailbox belonging to the United States Postal Service within the City of Raleigh, North Carolina.

Joan H. Byers
Special Deputy Attorney General General

Sworn to before me this
30th day of January, 1989.

Notary Public

My Commission Expires: 12-21-93

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SUPREME COURT, U.S.

88-5909

CERTIFICATE OF SERVICE

I hereby certify that I have served the annexed Petition for Certiorari and Motion for Leave to Proceed *In Forma Pauperis* on respondent by placing copies in the state courier service, addressed to: William N. Farrell, Jr., Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina.

This 14th day of November, 1988.

Marshall Dayan

Marshall Dayan

Supreme Court, U.S.
FILED
JAN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

NO. 88-5909

DOCK McKOY, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER NORTH CAROLNA'S CAPITAL SENTENCING PROCEDURE, WHICH NARROWS THE CLASS OF DEATH ELIGIBLE MURDERS AND PROVIDES FOR CONSIDERATION OF ANY EVIDENCE IN MITIGATION BY THE SENTENCER AND WHICH DOES NOT MANDATE THE DEATH PENALTY, RATHER REQUIRES THE EXERCISE OF GUIDED DISCRETION, EVEN WHERE AGGRAVATING BUT NO MITIGATING FACTORS ARE FOUND, VIOLATES LOCKETT V. OHIO, 438 U.S. 586 (1978) BY PLACING THE BURDER UPON THE DEFENDANT TO PROVE THE EXISTENCE OF FACTORS IN MITIGATION UNANIMOUSLY BY A PREPONDERANCE OF THE EVIDENCE.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

NO. 88-5909

DOCK McKOY, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT
STATE OF NORTH CAROLINA
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 27 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, the State of North Carolina responds to the Petition for Writ of Certiorari of Dock McKoy, and requests that this Court deny the relief sought by Petitioner on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

At the July 29, 1985 Session of Stanly County Superior Court, a Stanly County jury convicted Dock McKoy of the December 22, 1984 first-degree murder of Deputy Kress Horne. The jury then recommended a death sentence. In an opinion filed September 7, 1988, a majority of the Supreme Court of North Carolina found no error in either the guilt or sentencing stage of the trial. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988).

JURISDICTION

The jurisdiction of this Court has been properly invoked by Petitioner pursuant to 28 U.S.C. § 1257(3)(1982).

STATEMENT OF THE CASE

A. Procedural History

On December 22, 1984, Dock McKoy, Jr., shot Anson County Deputy Sheriff, Kress Horne, in the face. A grand jury from Anson County returned an indictment against McKoy for the first-degree murder of Deputy Horne on 7 January 1985. Venue was changed from Anson County to Stanly County. The case was then tried at the July 29, 1985 Criminal Session of Stanly County Superior Court before the Honorable William H. Truman, Judge Presiding, and a jury. At the conclusion of the guilt-innocence stage of the trial, the jury returned a verdict of first-degree murder based on the theory of premeditation and deliberation.

During the penalty phase, the jury unanimously found the presence of two aggravating factors and unanimously found that two of the eight submitted mitigating factors existed.

The jury then found unanimously and beyond a reasonable doubt that the aggravating factors found outweighed the mitigating factors found. The jury then found unanimously and beyond a reasonable doubt that the aggravating factors found, when considered with the mitigating factors found, were sufficiently substantial to warrant imposition of the death penalty. The jury then unanimously recommended that Dock McKoy receive the death penalty.

McKoy appealed his conviction to the Supreme Court of North Carolina. The case was first argued on March 14, 1988. After this Court's issuance of its opinion in Mills v. Maryland 486 U.S._____, 108 S.Ct. 1860, (1988), the Supreme Court of North Carolina on June 13, 1988, ordered further briefing in light of Mills v. Maryland and on July 28, 1988 ordered additional oral argument of this case for August 22, 1988. On September 7, 1988, a majority of the Supreme Court found no error in the guilt phase of the case and also found no error in the sentencing phase. Specifically, the Supreme Court of North Carolina held, in a 5-2 opinion, that the requirement in North Carolina that mitigating factors be found unanimously to exist was not violative of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny. State v.

McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988). McKoy petitioned this Court for a Writ of Certiorari on November 15, 1988 to review this issue.

B. The Trial Proceedings

The evidence at trial tended to show the following:

On December 22, 1984, 65 year old Dock McKoy lived in a neighborhood just outside of the town of Wadesboro in Anson County, North Carolina. That morning, McKoy's next door neighbor, Haywood Haskell was outside working on his wife's vehicle. He observed McKoy come out onto his porch and fire his shotgun into the air twice. Haskell suggested to McKoy that he ought not shoot his shotgun since children were playing in the area. McKoy rebuffed him by stating that "everyone else is shooting" and that it was Christmas.

Haskell then telephoned the Anson County Sheriff's Department to report the shootings. Officer Calvin Lambert of the Anson County Sheriff's Department responded to the call. He was in uniform and drove a marked patrol vehicle. Deputy Lambert first spoke with Haskell who informed Lambert that McKoy had gone back into his home. Deputy Lambert then went onto McKoy's porch and talked to him through the screen door. McKoy did not come out of his house despite Lambert's request that he do so. Lambert told McKoy not to shoot the shotgun because he, McKoy, was drunk. McKoy mumbled something in reply but Lambert initially could not understand him. Then McKoy asked Deputy Lambert if he could shoot his shotgun in the woods. Deputy Lambert, who believed from McKoy's mannerisms that he had been drinking, told him to sober up before he shot the gun again. Lambert then returned to his patrol vehicle, observed McKoy's home for several minutes, and then left the area.

Later in the afternoon, Haskell observed McKoy fall down on the hill leading from his outhouse to his home. Due to rain, the hill was somewhat slick. A neighbor helped McKoy, who could not stand unaided, back to his home. McKoy had locked himself out and had to gain entry into his home by prying open a front window. Not long after that McKoy asked twelve year old neighbor

Mark "Duke" Cox who was at Mr. Haskell's home to come over and help him fix the window he had pried open to get back in his house. After the young boy attempted to assist McKoy, and then returned to Haskell's yard, McKoy accused Cox of stealing his money. When the boy denied it, McKoy fired a shot towards Mark Cox. Cox ran home. McKoy walked after him and fired twice more in the direction of Cox and some other children. He actually hit Lilly Smith, Cox's adult sister, with one of the pellets. McKoy went into Cox's home with his shotgun and angrily confronted Ms. Smith concerning the money. When she told McKoy that Cox did not have his money, McKoy told her to be quiet or he would shoot her. After McKoy finally left her house, Lilly Smith (Mark Cox's sister) called the Sheriff's Department to report the shooting. Haywood Haskell also telephoned the Sheriff's Office because he believed McKoy was going to injure someone. Two Anson County Sheriff's Deputies - Kress Horne and Robert Usery - responded to the call at approximately 4:45 p.m. They arrived in a marked patrol vehicle and were in uniform. After speaking to Haskell, they called for Dock McKoy to come out of his house so they could talk to him. McKoy ordered the officers to leave or he would kill them. Deputy Horne again asked McKoy to come out so they could straighten out the incident. McKoy refused. He stated he would come out if the officers left.

More officers arrived, and Usery talked to several of the people struck by the shotgun pellets previously fired by McKoy. Horne continued to try to talk to McKoy about coming out of his house. Horne drew his service revolver and braced himself across the patrol vehicle, but did not attempt to use his weapon. McKoy pushed open his screen door and shot Deputy Horne full in the face with his shotgun. McKoy gave no warning to Deputy Horne before firing the shot. Deputy Horne died on December 23 from this wound.

The officers surrounded McKoy's house. McKoy was ordered to throw his weapon outside, but he refused to respond. He was warned if he did not surrender, tear gas would be used. He still did not respond. A deputy then threw a tear gas canister through

McKoy's window. McKoy fired several more shots from inside his house.

The officers returned a short burst of fire. McKoy walked out onto his porch carrying his .20 gauge single shot shotgun. The officers quickly disarmed him and took him into custody. The officers then took McKoy to the Anson County Hospital to be treated for two wounds he received during the exchange of gun fire.

A search of McKoy's house revealed several empty liquor bottles as well as a number of expended and unexpended shotgun shells.

At the hospital, Dr. Merceda Perry treated McKoy Perry found McKoy had sustained a deep flesh wound on his forehead and puncture wound to his buttocks. Initially, Dock McKoy had a strong odor of alcohol and was incoherent. At 6:30, his blood alcohol was .26. However, Dr. Perry gave McKoy three quarters of a quart of fluid. McKoy rapidly became more coherent. Dr. Perry did not give McKoy any pain medication while treating him because he did not seem to be uncomfortable. Dr. Perry sutured McKoy's head wound and cleaned the buttock wound. McKoy admitted to Dr. Perry that he had drunk a pint of liquor and shot a police officer who was pressuring him. At 8:15 p.m., Dr. Perry released McKoy into the custody of Carl Jackson, a State Bureau of Investigation Agent, along with two deputies.

The officers first took McKoy to the Anson County Sheriff's Department so that warrants for charges arising from the shootings could be served on him. Then they left in a van to take McKoy to Central Prison in Raleigh, North Carolina. The officers told McKoy they were taking him to Raleigh for safe keeping. McKoy's head was bandaged so that his left eye was partially obscured. He was blind in his right eye. He complained of thirst so they stopped the van and purchased two soft drinks for McKoy. He drank both bottles. At this time, he was sitting up by himself in the van.

At approximately 8:43 p.m., Officer Jackson read McKoy his Miranda rights. McKoy acknowledged he knew his rights, that he

had been tried for his life at one time.[1] McKoy refused to sign a waiver since he could not see the waiver form, but orally waived his rights. McKoy stated he killed Deputy Horne because Horne was pressuring him. At the time McKoy made the statements, in Officer Jackson's opinion, McKoy appeared sober and was not under the influence of medication. McKoy appeared comfortable. When McKoy stated he was cold, the heat in the van was turned up and a sheet was placed on McKoy. When McKoy made a statement that he was concerned for his life, he was reassured by the officers that he would not be harmed.

At one point, he also complained of a stiffness in his hip. When McKoy stated he was tired and his hip was aching, questioning ceased.

McKoy presented evidence from Dr. Bob Rollins who stated, in his opinion, McKoy's personality disorder, when combined with his low level of intellectual functioning-- he scored 74 on an IQ test given prior to trial (in 1980, he had scored 89 on an IQ test)--and his drunkenness caused the defendant to have been unable to know right from wrong when he shot Deputy Kress Horne. Dr. Rollins admitted that McKoy had satisfactorily held a job for the four years preceding the shooting.

McKoy took the stand and denied shooting the officer. He stated the Sheriff had come to his house and had started shooting into his door. He stated the Sheriff kept trying to serve warrants on a Paul McKoy, not him. McKoy stated he had not been drinking on December 22. On cross-examination, McKoy admitted that he was convicted for the December 26, 1976 non-fatal shootings of Jackie Nicholson, William Everett, and Mark Bostus with a .12-gauge shotgun.

The jury returned a verdict of guilty of first degree murder.

At the sentencing phase of the trial, the State introduced evidence of Dock McKoy's November 28, 1952 guilty plea to second-degree murder in Scotland County.

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1 State v. McKoy, 236 N.C. 121, 71 S.E.2d 921 (1952).

McKoy introduced evidence through Drs. Patricio Lara and Bob Rollins, both psychiatrists, that on December 22, 1984, McKoy was impaired in his ability to conform his conduct to the requirements of the law due to his intoxication, his limited intellectual functioning, and his personality disorder. Dr. Lara did admit when he spoke with McKoy during the examination, his thought process was coherent and he found no evidence of hallucinations, delusions, or psychosis.

Dr. Rollins testified that in his opinion McKoy was under the influence of an emotional or mental disturbance when he shot the officer. He testified that McKoy had high blood pressure and was blind in his right eye and that had some effect on his personality disorder.

The Court in sentencing submitted the following issues to the jury:

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: Yes.

1. Had Dock McKoy been previously convicted of a felony involving the use of violence to the person?

ANSWER: Yes.

2. Was this murder committed against a deputy sheriff while engaged in the performance of his official duties?

ANSWER: Yes.

* * *

Issue Two:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: Yes.

* * *

1. This murder was committed while Dock McKoy was under the influence of mental or emotional disturbance.

ANSWER: No.

2. The capacity of Dock McKoy to appreciate the criminality of his

conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER: Yes.

3. The age of Dock McKoy at the time of this murder is a mitigating circumstance.

ANSWER: No.

4. That for several decades Dock McKoy has exhibited signs of mental or emotional disturbance or defect that went untreated.

ANSWER: No.

5. That Dock McKoy has borderline intellectual functioning with an IQ test score of 74.

ANSWER: Yes.

6. That Dock McKoy's mental and emotional disturbance is aggravated by his poor physical health.

ANSWER: No.

7. Dock McKoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

ANSWER: No.

8. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER: No.

* * *

Issue Three:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER: Yes.

* * *

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER: Yes.

Based on the answers given to these issues, the jury unanimously recommended a sentence of death.

REASONS WHY THE WRIT OUGHT NOT ISSUE

NORTH CAROLINA'S REQUIREMENT THAT A DEFENDANT BEAR AN BURDEN OF PROOF AS TO SATISFY ALL THE JURORS AS TO THE EXISTENCE OF A FACTOR IN MITIGATION DOES NOT VIOLATE THE HOLDING OF EITHER MILLS V. MARYLAND OR LOCKETT V. OHIO.

Petitioner contends that Mills v. Maryland, 486 U.S.____, 108 S.Ct. 1860, (1988), requires summary reversal of this case since the Supreme Court of North Carolina allegedly has misperceived or refused to acknowledge this Court's holding in that case. However, the State submits that while Mills precludes the unanimity instructions given in that case in the context of the Maryland statute, this precedent ought not be expanded to prohibit North Carolina's requirement that mitigating factors be found unanimously in order to be used in the final balancing steps of the North Carolina death penalty sentencing proceedings.

In 1972, this Court in Furman v. Georgia, 408 U.S. 238 (1972), struck down various states' death penalty statutes because of the unbridled discretion given the sentencer by those statutes. The various states, in passing new capital punishment statutes, promulgated several distinct types of sentencing procedures to cure the defects addressed in Furman. See Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Lowenfield v. Phelps , 484 U.S. ____, 108 S.Ct. 546 (1988), but see, Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Generally, despite the different procedures present in the statutes, the Court has held that so long as a sentencing scheme "narrows the class of death eligible murders and then at the sentencing allows for consideration of mitigating circumstances and the exercise of discretion", the statute passes constitutional muster. Lowenfield v. Phelps, 484 U.S. at 108 S.Ct. 546 (1988). As the Court several times has made clear, "we are unwilling to say that there is any one right way for a state

to set up its capital punishment scheme." Spaziano v. Florida, 468 U.S. 447, 464 (1984).

The Court has expressly stated that no specific standards for balancing mitigating and aggravating factors are constitutionally required. See Zant v. Stephens, 462 U.S. 862; Franklin v. Lynaugh, 486 U.S._____, 108 S.Ct. 2320 (1988). However, conduct which is constitutionally tolerable under one sentencing scheme may not pass constitutional muster under another. For example, proportionality review is not constitutionally mandated. Pulley v. Harris, 465 U.S. 37 (1984). However, the presence or absence of such a review in a state's sentencing process has been found to be an important factor in determining whether the Constitution requires a death sentence must be overturned when one of several aggravating factors are subsequently ruled to have been improperly found. See Zant v. Stephens, supra. Maynard v. Cartwright, 486 U.S. ____, 108 S.Ct. 1853 (1988). Likewise, the type of balancing employed by the State in reaching a death sentence determination can determine what types of sentencing errors may later be deemed harmless. Barclay v. Florida, 463 U.S. 939 (1983). See also, Johnson v. Mississippi, 486 U.S. ____, 108 S.Ct. 1981 (1988), (Rehnquist, J., concurring). [2]

In Maryland, when the sentencer finds an aggravating factor unanimously to exist, but no mitigating factor is found, the jury, without any further consideration of the appropriateness of the punishment, must return a sentence of death. If mitigating factors are found, these factors are weighed against the aggravating factors found. If the aggravating factors are found to outweigh the mitigating factors found, the jury must recommend

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[2] The concept that a factor which one system can constitutionally tolerate might cause another system to be unconstitutional is by no means limited to the area of Death Penalty Sentencing procedures. As an example, twelve person juries are not constitutionally mandated and six person juries are appropriate and constitutionally sufficient. Williams v. Florida, 399 U.S. 78 (1970). While a majority verdict is acceptable in the context of a twelve person jury, Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972), a six person jury's verdict must be unanimous to pass constitutional muster.

death without further review. See Md. Ann Code Art. 27 § 413 (1987) Rep Vol.). Unlike the North Carolina Statute, Mayland prohibits jury consideration of the appropriateness of the death penalty when no mitigation is found; and, even where mitigation is found, affords very limited discretion in deciding the ultimate issue. Thus, when an otherwise reasonable burden of proof with respect to mitigation is placed upon a defendant under Maryland law, there is a substantial risk that the presumption that death is the appropriate sentence becomes unduly difficult to rebut. This transforms the statute into a mandatory penalty in violation of Woodson v. North Carolina, supra. In fact, it was on the basis of that argument that the Maryland Court of Appeals made its "saving" construction that evidence of mitigation remained legally relevant to be used by individual jurors in balancing factors in aggravation and mitigation even if the evidence of a mitigating factor had not been unanimously accepted by the jury. Mills v. State, 310 Md. 33, 527 A 2d 3 (1987).

North Carolina's capital punishment scheme, by contrast, has no requirement that the jury impose a death sentence if factors in aggravation are found, but the defendant fails to meet his burden of proving mitigation. A hold-out juror as to the existence of a factor in mitigation, then, cannot mandate a death sentence in North Carolina.

The sentencing scheme in North Carolina involves a four-step process in which the sentencer - always a jury - must first unanimously find the existence of one or more statutory aggravating factors unanimously and beyond a reasonable doubt. If aggravating factors are found, the jury must then unanimously find the existence of any mitigating factors by a preponderance of the evidence. Then the sentencer must balance the factors found against each other. If the sentencer finds unanimously and beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, the jury must then determine unanimously and beyond a reasonable doubt whether the aggravating factors found as diminished by the mitigating factors found are

sufficiently substantial to warrant imposition of the death penalty. State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 cert. denied , 464 U.S. 865 (1983). Thus, there is not one but two balancing steps which must be resolved unanimously before the death penalty may be recommended by the jury in North Carolina. Each of the four steps must be recorded on an "Issues and Recommendation Sheet" so that the reviewing Court may, with confidence, determine what factors the sentencer employed in making the life or death decision. See State v. Noland, 312 N.C. 1, 320 S.E.2d 642 cert. denied 469 U.S. 1230 (1984). The North Carolina sentencing scheme, then, is a carefully structured system which possesses a far more finely tuned balancing process than does the Maryland sentencing structure; more significantly, it creates no presumption of death upon the finding of aggravating factors. Unlike under Maryland law, there is no danger in North Carolina that "a single voter could block such consideration [of mitigation], and consequently require the jury to impose the death penalty . . ." Mills v. Maryland, 486 at ___, 108 S.Ct. at 1870 (1988). (emphasis added).

North Carolina's sentencing law is distinct from that of Maryland not only due to its inherent safeguards against the arbitrariness so easily awakened in the Maryland statute, but also in its interpretation of its own law. Maryland has held that evidence of a mitigating nature remains legally relevant for use in the sentencing process even after a defendant has failed to carry his burden of persuasion to prove to the jury unanimously the existence of mitigating circumstances. Mills v. State, supra.

North Carolina, by contrast, has held as a matter of state law construction that evidence which arguably supports the existence of a mitigating factor becomes legally irrelevant for the two balancing steps in the capital punishment statute if it is insufficiently persuasive to convince all of the jurors merely by a preponderance of the evidence that a mitigating factor exists. State v. McKoy, 323 N.C. at 40, 372 S.E.2d at 34. See also, State v. Kirkley, 308 N.C. 196, 217-218, 302 S.E.2d 144,

156 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988). Thus, North Carolina specifically asserts in the context of its statute that which Maryland did not - evidence which is insufficiently reliable to convince all twelve jurors of the existence of a mitigating factor is legally irrelevant pursuant to State law. See Mills v. Maryland, 486 U.S. at ____, 108 S.Ct. at 1865, n.7. Skipper v. South Carolina, 476 U.S. 1 (1986) and Lockett v. Ohio, 438 U.S. 586 (1978), do not prohibit this type of relevancy determination. Skipper held the State could not determine what types of factors are relevant as mitigation. Lockett v. Ohio, supra, held that the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Neither Lockett nor Skipper purport to relieve a defendant of the burden of convincing jurors of the existence of a mitigating factor. In fact, in Franklin v. Lynaugh, 486 U.S. ___ , 108 S.Ct. at 2330 (1988), a plurality of this Court stated, "Lockett does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors . . .". The requirement in North Carolina that a mitigating factor be found unanimously is nothing more than the State's placing upon a defendant an evidentiary burden to prove his claimed mitigation to the jury by reliable evidence. To place such a burden of proof upon a defendant surely does not violate Lockett. In making the determination of whether or not a mitigating factor has been proved to exist, the sentencer necessarily considers all evidence proffered by a defendant in support of the mitigating factor. Thus, the only limitation on the jury's further use of the proffered evidence is that the defendant bear the evidentiary burden of proving the underlying facts which constitute a mitigating factor to a reasonable degree of certainty. Lockett ought not be read to prevent the State from requiring the defendant, as well as the State, to bear some burden of persuasion in the sentencing process.

If Mills stands for the proposition that the State can at no time remove from jury consideration initially relevant evidence, which subsequently fails to meet a reliability standard, then any instruction requiring the jury or individual jurors to hold the defendant to any standard of proof as to the evidence presented is just as violative of Mills and Lockett as the unanimity requirement. See Adamson v. Ricketts, No. 84-2069, ____ F.2d ____ (9th Cir. 1988) (limited en banc).

This Court, in Patterson v. New York, 432 U.S. 197 (1977), explicitly stated:

> [The Supreme Court] should not lightly construe the constitution so as to intrude upon the administration of justice by individual states . . . [I]t is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of production of evidence and the burden of persuasion . . . . If the state . . . chooses to recognize a factor that mitigates the degree of criminality or punishment . . . and the State may assure itself that the fact has been established with reasonable certainty." 432 U.S. at 201, 209.

See also, Leland v. Oregon , 343 U.S. 790, 798 (1952).

There is nothing so unique about a capital sentencing hearing that should cause this Court to construe Lockett as mandating an exception to the generally accepted principle espoused in Patterson concerning a state's right to assign a burden of persuasion to a defendant.

The twin central principles of Eighth Amendment jurisprudence are that the sentencer's discretion must be "controlled by clear and objective standards so as to produce non-discriminatory application," Gregg v. Georgia, 428 U.S. 153, 189 (1976), while allowing the sentencer to give "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Neither of these twin goals is undercut by placing a burden of proof on a defendant to prove the facts underlying a factor in mitigation to the satisfaction of the entire sentencing body before that factor is deemed present. The necessity for

application of binding evidentiary standards to a defendant's evidence as well as that of the State is not a callous attempt to make an individual defendant's task to escape capital punishment more difficult. Rather, it is an integral part of the capital sentencing structure which helps to promote reliability and uniformity among cases in the jurisdiction. Failure to have clear evidentiary standards on finding mitigating factors would allow jurors to indulge in whim or . . . . caprice on the basis of speculative evidence to spare a defendant. While individual decisions to grant mercy are not unconstitutional, Gregg v. Georgia, supra, uniform evidentiary standards which bind all juries in all cases help to avoid disparate results in capital cases. See, McCleskey v. Kemp, 481 U.S. ____, 107 S.Ct. 1756 (1987).

Chief Justice Rehnquist, in his dissent in Mills pointed out that, "the Court's reliance on Lockett v. Ohio . . . and Eddings v. Oklahoma . . . is misplaced. The issue here is not whether the jurors were permitted to hear all the extenuating evidence petitioner cared to present; they undoubtedly were. Rather, as in Brown or Jurek, the question is whether a reasonable juror operating under the trial court's instructions would have considered this evidence of mitigating circumstances in a constitutional manner." 486 U.S.____, ____, 108 S.Ct. at 1875.

Here, due to the differences in the Maryland and North Carolina systems, the unanimity requirement allows the jury to consider mitigating evidence in a constitutional manner. Death could not be mandated as the jury's recommendation simply because of a "hold-out" juror's failure to find the existence of mitigating factors. Thus, the principal reason to find this evidentiary burden unconstitutional-- the danger of transforming a sentencing structure into an arbitrary one--is not present in North Carolina. See Mills v. Maryland, supra.

The requirement that the defendant, like the state be required to shoulder a specific evidentiary burden fosters reliability. "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life

should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). Rather "in capital sentencing . . . discretion must be controlled by clear and objective standards so as to produce non-discriminatory application." Id., at 198; California v. Brown, 479 U.S. 538, 544 (1987), (O'Connor, J. Concurring).

The unanimity requirement, which ensures that every factor both in aggravation and mitigation used in making the balancing decision has been shown to exist to a reasonable degree of certainty, fosters "the Eighth Amendment's need for reliability. It helps to channel a sentencer's discretion with clear and specific guidance in such a way as to make the process rationally reviewable. Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

The purpose of a jury is to "promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross section of the community." Burch v. Louisiana, 441 U.S. at 133. Each of these integral reasons for the jury to be a trier of fact at the guilt stage is equally compelling for a capital sentencing proceeding. cf, Spaziano v. Florida, supra. Each of the reasons for having a jury sentence the one is promoted by the unanimity requirement under system such as the one employed by North Carolina.

Group deliberation is obviously enhanced by the need for the jury to agree unanimously on the factors both in aggravation and mitigation. It is the discussion and debate over the existence of these factors that forces the jury to flesh out and examine the import of the evidence in light of all of the jurors' experiences and background. This debate permits the jury to give the factors the value necessary to make each of the factors a reliable component into the guided yet individualized inquiry into a defendant's moral culpability required by the Eighth Amendment. Informing each juror that he may consider whatever he desires in mitigation notwithstanding the view of his fellow jurors obviously detracts from the intensive group deliberation necessary to ensure a reliable sentencing decision. In fact,

such an instruction would free jurors from justifying to the others those factors the juror individually considered in reaching his ultimate decision.

A requirement that findings in mitigation as well as aggravation be unanimous likewise insulates each juror from outside pressure since all must agree and record each aggravating and mitigating factor found to exist. A single juror would feel less pressure to employ impermissible considerations such as race of the victim or the defendant when determining what factors mitigate if that juror knew his basis for decision must be unanimously agreed upon and recorded. See, e.g., Turner v. Murray, 476 U.S. 28, 35, (1986). Cf. McClesky v. Kemp, supra.

Finally, while not constitutionally required, Spaziano v. Florida, supra, jury sentencing in capital cases has wide acceptance among the states since "the imposition of the death penalty . . . is an expression of community outrage" and "the jury serves as the voice of the community." Spaziano, 468 U.S. at 461. Requiring that all jurors, in the case of a non statutory mitigating factor[3], agree that evidence supports a mitigating circumstance, requires the cross section of the community the jury represents to agree that the circumstance is, in fact, something society appropriately recognizes as being of a mitigating nature before it may be factored into the balancing equation. In the case of a statutory mitigating factor, requiring unanimity causes the community's cross section, based on the jurors' varied backgrounds, to conclude that evidence presented by the defendant is sufficiently credible in the community's view to support the existence of a factor. This requirement for common acceptance by all the jurors of mitigating evidence proffered by a defendance enhances reliability in sentencing. Failing to require unanimity would harm the fair

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[3] In North Carolina a statutorily prescribed mitigating factor must be considered mitigating if found to exist. State v. Kirkley, supra. As to non statutory mitigating circumstances proffered by a defendant, the jury finds both that the facts support the existence of the factor and that the factor is mitigating. State v. Fullwood, 323 N.C. 371, 394, 373 S.E.2d 518, 533 (1988).

cross section value of the jury as a sentencer since each juror would be free to exercise his own idiosyncratic beliefs as to what mitigates as opposed to being bound to consider only those circumstances which the jury--and by analogy the society it represents--all agree lessens the moral culpability of an individual for a crime. Rather than reflecting a reliable understanding of what society--as represented by the consensus of the jury--believes to be mitigating, judgments where unanimity is not required in mitigation as well as aggravation will be susceptible to individual whim and caprice.

Not only does unanimity in finding the existence of mitigation work to enhance the reliability of the jury's deliberative process, it also "insures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process." California v. Brown, 479 U.S. 538, 543 (1987).

North Carolina has proportionality review as a part of its mandatory appellate review of capital cases. N.C.Gen.Stat. § 15A-2000(d)(2) (1981). The pool of cases against which a capital case is compared includes all cases in which a sentencing hearing was held whether resulting in life or death. State v. Williams, 308 N.C. 47, 301 S.E.2d 335, cert. denied 464 U.S. 865 (1983). In making the comparison the Supreme Court of North Carolina does not engage in any type of statistical study. However, the Court does "compare the case at bar to other cases in the pool that are roughly similar with regard to the crime and defendant. . . . For this purpose the manner in which the crime was committed and the defendant's character, background, and physical and mental condition are relevant considerations." State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 486 U.S. ____, 108 S.Ct. 467 (1987). This type of searching review to ensure an individual's sentence is proportionate to other sentences received by other defendants and is not the product of arbitrariness, passion, or prejudice will obviously be severely hampered if the Court knows only what aggravating factors were found unanimously to exist and not what factors in mitigation were found to exist and used by

the jury in making the ultimate life or death weighing and balancing decisions. Thus, both during the sentencing hearing and during appellate review of the sentence, the reliability of the proceeding is enhanced in North Carolina by requiring the jury to find unanimously the existence of mitigating factors as well as aggravating factors before those factors may be used in the weighing and balancing process.

Certainly, the lack of a burden of proof on a defendant to prove mitigating factors would not enhance reliability in sentencing. To withdraw from the State the right to place an evidentiary burden of persuasion on the defendant under the theory that it precludes full consideration of mitigating evidence will deprive the state of any ability to shape and channel sentencer discretion. The only difference between this situation and the system found intolerable under Furman is that the class of persons to whom this unbridled discretion will be applied will be narrower (since one or more aggravating factors will have been found before mitigation evidence is examined.) Zant v. Stephens, supra. However, the result will be the same. Once aggravating factors have been found, each member of the jury would be free to engage in absolute open-ended, unfettered discretion in determining the existence of mitigating factors and what, in fact, mitigates. The disparate sentencing results to which this unchecked discretion could lead poses a dangerous obstacle to a fair and reliable sentencing system.

Mills v. Maryland dealt with the problems of unanimity instructions in the unique context of the Maryland capital punishment statute and the manner in which its state court interpreted it. However, unlike the situation in Maryland, a requirement that mitigating factors must be found unanimously to exist before the factors may be used in the further balancing procedures cannot have the effect of mandating a death sentence in North Carolina. The unanimity requirement is in accordance with North Carolina law defining legal relevance of evidence. The requirement promotes reliability in the sentencing proceeding and avoids the danger of opening jury deliberation once

aggravating factors are found to unfettered, open-ended, and largely unreviewable discretion by the jurors. Therefore, notwithstanding Mills v. Maryland, the unanimity requirement in North Carolina is an appropriate and constitutional allocation of a burden of proof.

Even if the distinctions drawn between the North Carolina and Maryland sentencing schemes, or the differences in state law concerning the continued legal relevancy of evidence which did not meet the burden of proof, do not automatically foreclose application of Mills v. Maryland, supra to the North Carolina sentencing instructions, this Court ought not summarily reverse this case. Due to the procedural posture in which Mills v. Maryland reached this Court, the issue to be decided in Mills dealt with whether or not the instructions given in Mills comported with the interpretation of Maryland law given by the Maryland Court of Appeals.

This Court has not had briefed the compelling reasons under a capital sentencing structure such as North Carolina's for requiring a defendant to carry a burden of persuading all jurors of the existence of a specific mitigating factor. Indeed, this Court has never reviewed the very real dangers involved in applying Lockett v. Ohio to cases which deal merely with evidentiary burdens of proof. See Adamson v. Ricketts, supra. (holding the Arizona statute unconstitutional because, among other issues, "Arizona Courts are precluded from weighing evidence of mitigation that, while not satisfying the evidentiary standard, nonetheless may give the sentencer reservations about the appropriateness of imposing a sentence of death. This exclusion of relevant evidence at the weighing stage violates the principle established by . . . Lockett . . . that a sentencing court must weigh all relevant mitigating evidence against the aggravating circumstances." slip op. p. 68).

If Mills v. Maryland, supra, is to be expanded beyond the unique situation present in that case, the states will need clarification as to what types of evidentiary burdens to prove mitigation, if any, a defendant may now be held. The states will

also need guidance in how to channel the sentencing proceedings to avoid the unfettered, open-ended discretion forbidden by Furman once the death eligible line has been passed if Mills is to be read in the fashion suggested by petitioner.

CONCLUSION

In view of the differences between the North Carolina capital punishment procedure and that of Maryland, summary reversal of this case on the basis of Mills v. Maryland is unwarranted. The requirement in North Carolina that mitigating evidence, as well as aggravating evidence, be proved to the satisfaction of the entire jury promotes reliability and does not offend the principles of Lockett v. Ohio. Accordingly, certiorari should be denied.

Respectfully submitted this the 30 day of January, 1989.

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CERTIFICATE OF SERVICE

I, JOAN H. BYERS, Special Deputy Attorney General, do hereby certify that I am a member of the Supreme Court of the United States and that I have on this date served a copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon the Attorney of record for Petitioner by depositing same in the United States mail, first class postage prepaid, and properly addressed as follows:

Robert S. Mahler
N.C. Death Penalty Resource Center
P.O. Box 1070
Raleigh, N.C. 27602

This the 30th day of January, 1989.

LACY H. THORNBURG
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ORIGINAL

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DOCK McKOY, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent

SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

Petitioner, Dock McKoy, respectfully submits this supplemental and reply brief pursuant to Rules 22.5 and 22.6 of the Rules of this Court in support of the Petition for a Writ of Certiorari docketed in this Court on November 17, 1988. Petitioner is filing this brief at this time to highlight the recent decision of the Supreme Court of North Carolina in *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *cert. granted, vacated and remanded,* ___ U.S. ___, No. 88-6833 (October 3, 1988), *prior decision adhered to,* 323 N.C. 622, 374 S.E.2d 622 (1988); to modify his prayer for relief in light of this action; and, to address arguments first raised by the Brief of Respondent in Opposition to the Petition for Certiorari.

I. THE REMAND IN LLOYD

The Question Presented in the instant petition is whether North Carolina's capital sentencing prodedure, which explicitly precludes jurors from considering mitigating evidence unless all twelve jurors unanimously find it to make out a

mitigating circumstance, violates this Court's holding in *Mills v. Maryland*, 486 U.S. ___ (1988).

Oscar Lloyd, another North Carolina death row inmate, is presently petitioning this Court for a writ of certiorari on substantially the same issue.[1] On October 3, 1988, this Court granted Lloyd's petition, and vacated and remanded the judgment of the North Carolina Supreme Court for further consideration in light of *Mills*. *Lloyd v. North Carolina*, ___ U.S. ___, No. 87-6833 (1988). Three days later, in affirming another North Carolina death penalty, the North Carolina Supreme Court reaffirmed its holding in McKoy. *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988).

The North Carolina Supreme Court's decision in *Allen* foreshadowed the action it would take in *Lloyd* on remand from this Court. One day after the instant petition was docketed in this Court, the North Carolina Supreme Court on November 18, 1988 reinstated its prior decision in *State v. Lloyd*. The entire order reads,

> Upon receipt and consideration of the mandate of the Supreme Court of the United States in this cause, issued 3 October 1988, the following order was entered and is hereby certified to the Superior Court, Cherokee County.
>
> On 3 October 1988 the Supreme Court of the United States vacated our opinion reported at 321 N.C. 301, 364 S.E.2d 316 (1988), and remanded this cause for reconsideration in light of Mills v. Maryland, 486 U.S. ___, 100 L.Ed.2d 384 (1988). Upon such reconsideration, for the reasons set forth in our opinion in State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), we continue to adhere to our opinion reported at 321 N.C. 301, 364 S.E.2d 316 (1988). Therefore, the mandate of that opinion is hereby reinstated.
>
> Done by the Court in conference, this the 17th day of November, 1988.

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[1] The Question Presented in *Lloyd v. North Carolina*, No. 87-6833, *cert. petition docketed* April 22, 1988, was "Whether the Eighth and Fourteenth Amendments are violated when the sentencing jury at the penalty phase of a capital murder trial is instructed that it must unanimously find the existence of a mitigating circumstance before any member of the jury may give weight to the mitigating circumstance in the actual decision between life and death?"

This order was dissented to by Chief Justice Exum and Justice Frye, the dissenters from the court's opinion in *McKoy*.[2]

The North Carolina Supreme Court hence appears unwilling to reconsider its position. Petitioner, therefore, must to this Court to grant the relief to which he is, under *Mills*, clearly entitled.

II. REPLY TO NEW ARGUMENTS

The Petitioner anticipated and answered most of the State's arguments opposing certiorari. The State has added a few new arguments, none of which have merit and to which the Petitioner will reply below.

First, the State cites *Adamson v. Ricketts*, No. 84-2069 (9th Cir. Dec. 22, 1988) (limited en banc), apparently for the proposition that if this Court holds for the Petitioner, "then any instruction requiring the jury or individual jurors to hold the defendant to any standard of proof as to evidence presented is just as violative of *Mills* and *Lockett* as the unanimity requirement." Brief in Opposition, p. 14. This position is completely unsupported. The Petitioner has not raised in this petition the question of whether the State may impose a burden of persuasion upon a capital defendant to prove mitigation. Indeed, the North Carolina capital sentencing scheme includes such a burden of persuasion on the defendant to prove the existence of mitigation by a preponderance of the evidence. *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). Rather the question before this Court is whether the State may allow one holdout juror to preclude the entire jury from considering mitigating circumstances which eleven of the twelve jurors found by a preponderance of the evidence. That question was firmly decided in the Petitioner's favor in *Mills*.

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[2] Oscar Lloyd has petitioned this Court for a writ of certiorari to review the Supreme Court of North Carolina's November 18, 1988 Order. *Lloyd v. North Carolina*, No. 88-6348.

The State also argues that North Carolina's unanimity requirement fosters reliability by enhancing group deliberation and ensuring that the decision on mitigation reflects the entire cross-section of the community. Brief in Opposition, pp. 15-18. This argument likewise is utterly without merit. In North Carolina the decision to find and consider mitigation must be unanimous, but the decision to ignore, or as the State would have it--determine irrelevant, evidence of mitigation may be made by a lone holdout juror. A system that permits a single rogue juror to preclude consideration of mitigating evidence by the entire jury does not promote reliability. Furthermore, this Court has held that unanimity in jury verdicts does not necessarily enhance reliability. *Johnson v. Louisiana*, 406 U.S. 356 (1972) (a non-unanimous verdict "raises no questions of constitutional substance about either the integrity or the accuracy of the majority verdict.").

Thus in North Carolina, as in Maryland before *Mills*, a single juror could force the exclusion of mitigating evidence from the case and thereby require the imposition of the death penalty despite the existence of mitigation that would cause eleven of the twelve jurors to vote for life if they were allowed to consider it. Such a system can hardly be called reliable, and certainly not in the sense required by the Eighth Amendment; in fact, "it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances so postulated by the petitioner." *Mills*, 486 U.S. at ___ (1988).

III. PRAYER FOR RELIEF

In his Petition for Writ of Certiorari, Petitioner requested that this Court grant the petition, issue the writ, and summarily reverse the sentence of death affirmed by the North Carolina Supreme Court in light of *Mills v. Maryland*, 486 U.S. ___ (1988). Alternatively, the Petitioner requested that this Court grant the petition, and vacate and remand the judgment of the North Carolina Supreme Court for further consideration in light of *Lloyd v. North Carolina, cert. granted*, 486 U.S. ___, No. 87-6833 (1988). Petitioner sought this alternative relief because this Court disfavors summary reversal, but the issue did not require full briefing and argument. However, in light of the November 18, 1988 Order of the Supreme Court of North Carolina reinstating its prior opinion, discussed in Part I of this brief, it no longer

appears that any purpose would be served by remanding the case to the Supreme Court of North Carolina. The North Carolina Court is obviously not willing to move on this issue without explicit direction from this Court.

However, the Petitioner still believes that summary reversal is the most appropriate action for this case. The issue before this Court has been as thoroughly litigated as any criminal law issue in recent North Carolina history. After this Court issued its opinion in *Mills*, the Supreme Court of North Carolina requested special briefing and, after considering the briefs, requested oral argument at a special term of Court, solely on the question of the applicability of *Mills* to the North Carolina capital sentencing procedure. The opinion of the Supreme Court of North Carolina in *McKoy* set out the State's several contentions and relied upon them to the extent that the court declared itself "unable to conclude with any degree of certainty that *Mills* rendered [the North Carolina] capital sentencing procedure constitutionally infirm." *State v. McKoy*, 323 N.C. 1, 44, 372 S.E.2d 12, 35 (1988). In dissent, Chief Justice Exum wrote that the majority's opinion "stands *Mills* and the Eighth Amendment jurisprudence upon which it rests upon their respective heads." *McKoy*, 323 N.C. at 54, 372 S.E.2d at 45 (1988) (Exum, C.J. dissenting).

The petitioner recognizes that summary decision is not favored by the Court, and "should be reserved for palpably clear cases of constitutional error." *Eaton v. Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J. dissenting) (citations omitted), *cited in*, Stern, Gressman and Shapiro, SUPREME COURT PRACTICE 282, n.82 (6th ed. 1986). Nevertheless, this Court has recently employed summary reversal in a criminal case on certiorari from state direct appellate review. *Olden v. Kentucky*, 488 U.S. ___ (1988). In *Olden*, "[t]he Kentucky Court of Appeals failed to accord proper weight to petitioner's Sixth Amendment right . . . ." *Id.*

This is an even more compelling case for summary reversal. *Mills v. Maryland*, 486 U.S. ___ (1988) is recent and controlling precedent of this Court which is contrary to the decision of the Supreme Court of North Carolina. This Court held in *Mills* that the Eighth Amendment forbids instructions which lead a

juror to believe that only those mitigating circumstances could be considered which were unanimously found to exist. The only pertinent way in which the North Carolina system differs from the one condemned in Maryland is that in North Carolina the judge explicitly directs the jury that it may not consider mitigating evidence if the jury is not unanimous, while in Maryland that unconstitutional result was merely implied. Whatever else may be said, *Mills* explicitly and authoritatively answers the question whether states may employ a unanimity requirement as to mitigating evidence in structuring their capital punishment schemes with a resounding "no."

Secondly, the recently more-favored remedy employed in such situations, granting the writ, reversing and remanding a judgment to the lower court for reconsideration in light of intervening precedent, *see Stern & Gressman* at 279, n.73 and accompanying text, has already been employed on this issue, *Lloyd v. North Carolina*, __ U.S. __, No. 87-6833 (1988) and has failed to achieve any reasoned reconsideration by the North Carolina Supreme Court. When this Court granted, vacated and remanded *Lloyd*, it had already been apprised of the North Carolina Supreme Court's treatment of *Mills* in the instant case. This Court need not accept cases from different states in order that the law as enunciated in a case arising from a particular state court be applied elsewhere.

Further, the State has had an extraordinary amount of time to marshal its best arguments before this Court. The petition in this case was docketed on November 17, 1988. The State sought and obtained extensions of time to delay filing its brief in opposition until January 30, 1989. Thus, the State enjoyed a longer period of time to prepare and file its brief in opposition than most litigants before this Court have to prepare and file a brief on the merits. Sup.Ct.R. 35.2. Indeed, the State's twenty-one page brief in opposition spends practically no time arguing that the issue before this Court is not worthy of the grant of certiorari but instead argues the merits of the case. Under these circumstances, further delay and briefing by the State is neither necessary nor desirable.

CONCLUSION

Petitioner respectfully requests that this Court grant the writ and summarily reverse the judgment of the North Carolina Supreme Court insofar as the death sentence was imposed in this case in violation of the Eighth and Fourteenth Amendments to the United States Constitution as construed in this Court's decision in *Mills v. Maryland*, 486 U.S. __ (1988). Alternatively, Petitioner respectfully requests that this Court grant the writ.

Respectfully submitted,

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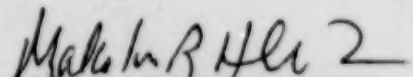
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Supplemental and Reply Brief in Support of Petition for Writ of Certiorari was served on the State of North Carolina by depositing a copy of the same in an official depository of the United States Postal Service, in a postage-paid envelope, addressed as follows:

Ms. Joan H. Byers
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina

This the 13th day of February, 1989.



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(5)

No. 88-5909

Supreme Court, U.S.
FILED
APR 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOCK MCKOY, JR.,

Petitioner,

v.

NORTH CAROLINA

On Writ of Certiorari to the Supreme Court of North Carolina

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 17, 1988.
CERTIORARI GRANTED FEBRUARY 21, 1989.

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
09/30/85	Order Allowing Stay of Execution
11/17/86	Record on Appeal Filed; Appeal Docketed.
08/19/87	Defendant-Appellant's Brief.
02/05/88	Brief for the State.
03/14/88	Oral Argument.
06/13/88	Order Directing Filing of Supplemental Briefs In Light of *Mills v. Maryland*.
06/30/88	Defendant-Appellant's Supplemental Brief.
07/11/88	Supplemental Brief for the State.
08/22/88	Supplemental Oral Argument.
09/17/88	Opinion Filed—No Error (Wichard, J.); (Exum, C.J., dissenting); (Frye, J., dissenting); (Martin J., dissenting in part).
10/07/88	Certification of Opinion.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NORTH CAROLINA, STANLY COUNTY

File No. 85-CRS-2617

STATE OF NORTH CAROLINA

vs.

DOCK MCKOY,
Defendant.

DEFENDANT'S REQUESTED INSTRUCTION NO. 6

NOW COMES the defendant, Dock McKoy, and hereby requests that the court instruct the jury as follows:

> With respect to each of the mitigating circumstances, only those mitigating circumstances unanimously found by you to exist should be marked "Yes" by you on the verdict sheet. However, no single juror is precluded from considering anything in mitigation in the ultimate balancing process, even if that mitigating factor was not considered or agreed upon by all 12 of you unanimously.

ACCEPTED .....

REJECTED .....

MODIFIED .....

WITHDRAWN .....

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

(Title Omitted in Printing)

• • • •

[1141] MR. STOKES: Yes, sir. Your Honor, I'd like to hand this up, the defendant's request for instructions, number one through eleven.

(Mr. Stokes approaches the bench.)

THE COURT: You say you have a copy for the District Attorney?

MR. STOKES: Yes, sir, I do.

MR. LOWDER: If Your Honor please, we apologize for interrupting the Court. We would like to know, in looking at these matters, whether or not counsel is asking that these instructions be given in lieu of the standard charge or in addition to the standard charge?

MR. STOKES: In addition.

THE COURT: Well, my intention is to give the pattern jury instruction and I will not give any additional instructions.

• • • •

TRANSCRIPT OF JURY INSTRUCTIONS

(Penalty Phase)

[1175] JUDGE FREEMAN'S CHARGE TO THE JURY:

Members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to decide or to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment. Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will be required to impose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will be required to impose a sentence of imprisonment in the State's prison for life.

All of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing proceeding any evidence which was submitted during the guilt phase of this case. All of the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment.

It is now your duty to decide from all the evidence presented in both phases what the facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or as you might like [1176] it to be. This is important because justice require that everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner, and have the same law applied to him.

You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial, these tests may include: the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he testified; the manner and appearance of the witness; any interest, bias, or prejudice the witness may have; the apparent understanding and fairness of the witness, whether his testimony is reasonable; and whether his testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable evidence in the case.

[1177] I charge that for you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or the lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things.

First, that one or more aggravating circumstances existed. Second, that any mitigating circumstances you have found are insufficient to outweigh any aggravating circumstances you have found. Third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances you have found.

If you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to recom-

mend that the defendant be sentenced to life imprisonment.

When you retire to deliberate your recommendation [1178] as to punishment, you will take with you a form entitled, "Issues and Recommendation as to Punishment." This form contains a written list of four issues relating to aggravating and mitigating circumstances. I will now take up these four issues with you in greater detail, one by one. To enable you to follow me more easily, I'm going to have the bailiff give each of you a copy of the form entitled "Issues and Recommendation as to Punishment," which you will take with you when you retire to deliberate. Do you read ahead on this form, but if you will just refer to it as I instruct you on the law. So, Sheriff, if you will step up here please, I believe we have thirteen copies of this. Did everybody get a copy? The alternate has one too I believe.

All right. Issue Number One is, "Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?" There are two possible aggravating circumstances that are listed on the form, and you should consider each of them before answering Issue Number One.

The State of North Carolina must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance, and, before you may find any aggravating circumstance, you must agree unanimously [1179] that it has been so proven. An aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law. Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as aggravating circumstances. Under the evidence in this case two possible aggravating circumstances may be considered.

The following are the aggravating circumstances which might be applicable to this case.

The first is, "Had Dock McCoy been previously convicted of a felony involving the use of violence to the person?" And I instruct you that second degree murder is by definition a felony involving the use of violence to the person. A person has been previously convicted if he has been convicted and not merely charged, and if his conviction is based on conduct which occurred before the events out of which this murder arose. If you find from the evidence beyond a reasonable doubt that on or about 1952 Dock McCoy—(STRIKE THAT)—If you find that on or about December the 22nd, 1984, that Dock McCoy had been convicted of second degree murder, and that he, Dock McCoy, killed Deputy Kress Horne, after he had committed the second degree murder, [1180] you would find this aggravating circumstance, and would so indicate by having your foreman write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstnce, and will so indicate by having your foreman write, "No." in that space.

Now, the second possible aggravating circumstance is, "Was this murder committed against a deputy sheriff while engaged in the performance of his official duties? A murder is so committed if, at the time the defendant kills the victim, the victim is a deputy sheriff and is at that time engaged in the performance of an official duty. An official duty is anything which is necessary for a deputy sheriff to do in his capacity as a deputy sheriff. If you find from the evidence beyond a reasonable doubt that when Dock McCoy killed Deputy Kress Horne, that Kress Horne was a deputy sheriff and at that time was answering a disturbance call pursuant to a dispatch to the Sheriff's Department and that this was among the official duties as a deputy sheriff, you would find this

aggravating circumstance, and would so indicate by having your foreman write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a [1181] reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreman write, "No," in that space.

Now, if you unanimously find from the evidence beyond a reasonable doubt that one or more of these aggravating circumstances existed, and have so indicated by writing, "Yes," in the space after one or more of them on the "Issues and Recommendation" form, you would answer Issue One, "Yes." If you do not unanimously find from the evidence and beyond a reasonable doubt that at least one of these aggravating circumstances existed, and if you have so indicated by writing, "No," in the space after both of them on that form, you would answer Issue Number One, "No." If you answer Issue Number One, "No," you would skip Issues Two, Three and Four and you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue Number One, "Yes," then you would consider Issue Number Two.

Issue Number Two is, "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" Eight possible mitigating circumstances are listed on this form, and you should consider each of them before answering Issue Number Two.

[1182] A mitigating circumstance is a fact or group of facts, which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders. Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence which you deem to have mitigating value.

Now, the defendant, Dock McCoy has the burden of persuading you that a given mitigating circumstance exist. The existence of any mitigating circumstance must be established by a preponderance of the evidence. That is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exist. You would find that circumstance if the evidence satisfies you that a mitigating circumstance exist. If not, you would not find it. But in either event, you would move on to consider the other mitigating circumstances and continue [1183] in a like manner until you have considered all of the mitigating circumstances listed on the form and any others that you deem to have mitigating value.

It is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

Number one, consider whether this murder was committed while Dock McCoy was under the influence of mental or emotional disturbance. A defendant is under such influence if he is in any way affected or influenced by a mental or emotional disturbance at the time he kills. Being under the influence of mental or emotional disturbance is similar but not the same as being in the heat of passion upon adequate provocation. A person may be under the influence of mental or emotional disturbance even if he had no adequate provocation and even if his disturbance was not so strong as to constitute heat of passion or preclude deliberation. For this mitigating circumstance to exist, it is enough that the defendant's mind or emotions were disturbed from any cause and

that he was under the influence of the disturbance when he killed Kress Horne. You would find this mitigating circumstance if you find that the defendant suffered from personality and adjustment disorders, and that as a result Dock McCoy was under the influence of [1184] mental or emotional disturbance when he killed Kress Horne and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the second mitigating circumstance that you should consider is whether the capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that he is—or to know that what he is doing at a given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing, or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did [1185] appreciate the criminality of his conduct, if his capacity to conform to the law is impaired, since a person may appreciate that the killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of intoxication, or mild mental retardation, or personality disorder, or adjustment disorder, is lessened or diminished because of

such intoxication, or mental or emotional disorder, or borderline intelligence. You would find this mitigating circumstance if you find that Dock McCoy drunk a quantity of whiskey during the hours of the killing or that he suffered from adjustment, or personality disorder, or that he had borderline mental deficiency, and that this impaired his ability—(STRIKE THAT)—and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the third possible mitigating circumstance [1186] that you should consider is whether the age of Dock McCoy at the time of this murder is a mitigating factor. The mitigating effect of the age of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence, and would so indicate it by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the fourth mitigating circumstance that you should consider is that whether for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated. Now, the mitigating effect of this circumstance is for you to determine from all of the facts and circumstances which you find from the evidence and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you would so

indicate by having your foreman write, "No," in that space.

Now, the fifth mitigating circumstance that you [1187] should consider is whether Dock McCoy has borderline intellectual functioning with a I.Q. test score of 74. And the mitigating effect of the defendant's I.Q. is for you to determine from all of the facts and circumstances which you find from the evidence and which—and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, "No," in that space.

Now, the sixth, consider whether Dock McCoy's mental and emotional disturbances—whether his mental and emotional disturbance is aggravated by his poor physical health. And the mitigating effect of the aggravation of his poor mental health is for you to determine from all of the facts and circumstances which you find from the evidence, and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issue and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you would so indicate it by having your foreman write, "No," in that space.

Now, number seven, you should consider whether [1188] Dock McCoy's ability to remember the events of December the 22nd, 1984, is actually impaired. The mitigating effect of the impaired memory of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence and would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write, "No," in that space.

Now, number eight, you should consider whether Dock —Number eight, you should finally consider whether any —consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value. If you do unanimously so find by a preponderance of the evidence, you will so indicate by having your foreman write, "Yes," in the space after the mitigating circumstance on the "Issue and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write, "No," in that space. If you unanimously find by a preponderance of the evidence one or more mitigating circumstances and have so indicated by writing, "Yes," in the space after one or more of them [1189] on the "Issues and Recommendation" form, you would answer Issue Number Two, "Yes." If you do not unanimously find by a preponderance of the evidence that at least one of these mitigating circumstances existed, and if you have so indicated by writing, "No," in the space after every one of them on that form, you would answer Issue Number Two, "No." If you answer Issue Number Two, "Yes," you must consider Issue Number Three. If you answer Issue Number Two, "No," you will not answer Issue Three. Instead, skip Issue Three and answer Issue Four.

Now, Issue Number Four—excuse me, Issue Number Three is, "Do you unanimously find beyond a reasonable doubt that the mitigating circumstances or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?" If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the

evidence what value to give to each circumstance, and then weigh the aggravating [1190] circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the mitigating circumstances outweigh the aggravating circumstances.

If you unanimously find, beyond a reasonable doubt, that the mitigating circumstances found by you are insufficient to outweigh the aggravating circumstances found by you, you would answer Issue Three, "Yes." If you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three, "No." If you answer Issue Three, "No," it will be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three, "Yes," you must consider then Issue Number Four.

Issue Four is, "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you. In deciding this issue you're not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable [1191] doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue, "Yes." In so doing, you're not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of the other kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasion—persuasiveness of the existing aggravating and mitigating circumstances in making this determination.

You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared to the totality of the mitigating circumstances found by you. After so doing, if you're satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, it would be your duty to answer the issue, "Yes." If you are not so satisfied or have a reasonable doubt, it will be your duty to answer the issue, "No." In the event you do not find the existence of any mitigating circumstances, you must still answer this issue. And in such case you must [1192] determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death penalty. Substantial circumstances may be contrasted with circumstances that are flimsy, abstract, imaginary, accepted or negligent. Substantial means having substance or weight, important, significant or momentous.

Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence, beyond a reasonable doubt, the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue Four, "Yes," you must agree unanimously that they are. If you answer Issue Four, "No," you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue Four, "Yes," it would be your duty to recommend that the defendant be sentenced to death.

Now, members of the jury, you have heard the evidence and the arguments of counsel for both the State and for

the defendant. I did not summarize the evidence, [1193] but it is your duty to remember all of the evidence whether it's been called to your attention or not, and if your recollection of the evidence differs from mine or that of the District Attorney, or that of the defense attorney, you are to rely solely upon your own recollection of the evidence in your deliberations. I did not review the contentions of the attorneys in their speeches to you, but it is your duty not only to consider all the evidence, but also to consider all the arguments, the contentions and positions argued by the State's attorney and the defendant's attorney in their speeches to you, and any other contention that arises from the evidence, and to weigh them in the light of your common sense, and to make your recommendation as to punishment.

Now, the law, as indeed it should, requires the presiding judge to be impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice or expression on my face, or any question I may have asked a witness, or anything else that I may have said or done during this trial, that I have an opinion or have intimated an opinion, as to whether any part of the evidence should be believed or disbelieved, as to whether any aggravating or mitigating circumstance has been proved or disproved, or as to what your recommendation ought to be. It is your exclusive province [1194] to find the true facts of the case and to make a recommendation reflecting the truth as you find it.

Now, when you're ready to make your recommendation, have your foreman write in your recommendation as directed on the "Issues and Recommendation" form.

At this time I will ask all of you just to pass those forms back to the bailiff. We will take all of those up and then I'll give you one.

Have you got all thirteen?

THE BAILIFF: Yes, sir.

THE COURT: Everybody gave them to the Sheriff, I assume? All right, at this time I will excuse the alternate juror. You can just sit right there until they go back. Sir, when they go back to deliberate, you are excused and I thank you for serving. You're certainly welcome to wait if you want to, have a seat out there, and you can wait and see what your fellow jurors do, or if you would like to go home, you're excused to go home.

Now the rest of you, if you will retire to the jury room. You should first select one of your members to serve as foreman to lead you in your deliberations. Do not begin your deliberations until you receive the written form from the bailiff, and you will proceed immediately with the selection of your foreman. And then after you receive the written form, proceed with your [1195] deliberations. When you've reached a unanimous decision on the "Issues and Recommendation" and are ready to pronounce it, and your foreman has written the answers on the form, have your foreman sign and date it, notify the bailiff by knocking on the door of the jury room, and you will be returned to the courtroom to pronounce your answers to the "Issues and Recommendation". If you will step back to that room now and proceed with the selection of a foreman.

(The jury leaves the courtroom at approximately 3:40 p.m.)

THE COURT: All right. Before I send the "Issues and Recommendation" form to the jury and let them begin their deliberations I'll consider any request for corrections or additional matters that anyone feels necessary or appropriate to submit a proper charge to the jury. Any for the defense?

MR. STOKES: No, sir.

THE COURT: Any for the State?

MS. WALLACE: No, sir.

THE COURT: All right. Mr. Sheriff, if you will give them that form, please.

(The jury returns to the courtroom at approximately 5:23 p.m.)

THE COURT: Who is the foreman?

[1196] THE FOREMAN: (Walter Wild)—I am.

THE COURT: Do y'all have a question, sir? Is that it?

THE FOREMAN: Yes, sir. We're a little confused on Issue Two, Question Two. Is it a two-part question? Can you fully explain it?

THE COURT: You can have a seat. Are you talking about the mitigating circumstances which reads, whether the capacity of Dock McCoy to appreciate the criminality of this conduct or to conform his conduct to the requirements of the law was impaired. Is that what you're talking about Your question is whether that's a two-part question?

THE FOREMAN: Is it a two-part question or can you explain it? The reason we think it's possibly a two-part question is because of the word "or".

THE COURT: Let me repeat this to you and see if this clears it up. On this question, you are to consider whether the capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that what he is doing at a given time is killing [1197] or that such killing is wrong. A persen may indeed know that a killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing, or how wrong it is. Further, for this mitigating circumstances to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was

lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did appreciate the criminality of his conduct, if his capacity to conform to the law is impaired, since a person may appreciate that the killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of intoxication, or mental retardation, or personality disorder, or behavioral deficiency is lessened or diminished because of such impairment. You would find this mitigating factor if you find that Dock McCoy consumed a large quantity of whiskey during the hours before the killing or that he suffered from mild mental retardation, or he suffered from the emotional or mental disturbances, or deficiencies, and that this impaired his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements [1198] of the law, and you would so indicate by having your foreman write, "Yes," in the space after this mitigating circumstance on the "Issues and Recommendation" form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write, "No," in that space. Now, do you think that answers your question?

THE FOREMAN: Yes.

THE COURT: All right. If you will step back there and resume your deliberations.

(The jury retires to the jury room at approximately 5:30 p.m.)

THE COURT: Any objection to that additional instruction or any request for anything further or corrections?

MR. STOKES: No, sir.

THE COURT: Let the record show there's none from the defendant and none from the State. We will stand at ease for awhile.

(The jury returns to the courtroom at approximately 6:17 p.m.)

THE COURT: All right. Mr. Foreman, I certainly don't want to know how your deliberations are going or what your count is, or anything of that nature, but it is 6:15. Do y'all feel like that if you were [1199] allowed to deliberate a little bit longer today you could reach a verdict or had you rather come back tomorrow.

THE FOREMAN: I believe we can reach it today, Your Honor, in a reasonable amount of time.

THE COURT: You understand I'm certainly not rushing you. You have all day tomorrow and the next day if you need to take that much time. If you will step back there and resume your deliberations. If you come to the point where you think it's going to take a considerable more amount of time, you might knock on the door and tell the sheriff, and we will let you come back tomorrow. Step back there and resume your deliberations.

(The jury retires to the jury room at approximately 6:17 p.m. and returns to the courtroom at approximately 6:25 p.m.

THE COURT: Mr. Foreman, have you reached a verdict?

THE FOREMAN: No, sir. We would like to request one more day.

THE COURT: All right. Would you give that verdict sheet to the bailiff there and we will have that sealed and put in an envelope. Members of the jury, I am going to let you go home. Let me caution you again, as I've done a number of times,—give it to the Clerk [1200] there and if you will seal that in an envelope. Let me caution you, as I've done a number of times, it is extremely important. Do not talk about this case among yourselves, don't talk to anybody at home about it, don't talk to anybody or carry on any conversation at all with anybody involved in the case. Don't regard

it on any news media and don't let anybody tell you what they might have heard or read about it, and don't make any independent study or investigation on your own. If anybody tries to talk with you about this case, just report that to the Court at your earliest convenience. Given the lateness of the hour, I might let you come in at ten o'clock in the morning. If you will be back in here at ten o'clock and just report right directly to that jury room, but do not begin your deliberations until all twelve jurors are present. Once all twelve of you are here, the sheriff will bring you that verdict sheet back to you and then you can begin your deliberations. So everybody will just remain seated until the jury can get out on the elevator.

RECESS.

DATE: August 8, 1985.

THE COURT: Why don't you bring all the jurors out here and let me make sure they are not deliberating any.

(The jury returns to the courtroom from the jury room.)

[1201] THE COURT: Good morning, members of the jury. I assume none of you heard anything or read anything about this case in any of the news media. I believe when you left yesterday your foreman had informed me that you have so far been unable to agree on a verdict. I want to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women and to reconcile your differences if you can without the surrender of conscientious conviction, but no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict. I will let you resume your deliberations and see if you can reach a verdict. If y'all will step back there, please. Sheriff, if you will give that to the foreman, please.

(The jury retires to the jury room at approximately 10:12 a.m. and returns to the courtroom at approximately 11:15 a.m.)

THE COURT: Mr. Foreman, I believe you have reached a unanimous verdict, is that correct?

THE FOREMAN: Yes, Your Honor.

THE COURT: Would you hand that verdict sheet to the sheriff, please. Now, members of the jury, your [1202] foreman has returned in open court a unanimous verdict, answering the first issue, "Yes," the second issue, "Yes," the third issue, "Yes," the fourth issue, "Yes," and recommended as its punishment that the defendant, Dock McCoy, be sentenced to death. Is that your verdict so say you all.

(All jurors indicate affirmatively.)

THE COURT: I assume you want to poll the jury.

MR. STOKES: I want to poll the jury.

THE COURT: Mr. Foreman, would you stand up, please? Mr. Foreman, you have returned a verdict of guilty—well, you've returned a verdict of answering all four issues, "Yes," and recommending that the defendant be sentenced to death. Is this your verdict?

THE FOREMAN: (Walter H. Wild)—Yes, Your Honor.

THE COURT: Is this still your verdict?

THE FOREMAN: (Walter Wild)—Yes, Your Honor.

THE COURT: Thank you, sir. You may sit down. Juror Number One, Soyna Dial, would you stand up, please. Ma'am, your foreman has announced a verdict answering all four issues, "Yes," and recommending as its punishment death. Is this your verdict?

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NORTH CAROLINA, STANLY COUNTY

85-CRS-2617

(Title Omitted in Printing)

ISSUES AND RECOMMENDATION AS TO PUNISHMENT

ISSUES

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER YES.

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

1. Had Dock McCoy been previously convicted of a felony involving the use of violence to the person?

ANSWER YES.

2. Was this murder committed against a deputy sheriff while engaged in the performance of his official duties?

ANSWER YES.

IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE, AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE, "YES" PROCEED TO ISSUE TWO.

Issue Two:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER YES.

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. WRITE, "NO," IF YOU DO NOT UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE TWO.

1. This murder was committed while Dock McCoy was under the influence of mental or emotional disturbance.

ANSWER NO.

2. The capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER YES.

3. The age of Dock McCoy at the time of this murder is a mitigating circumstance.

ANSWER NO.

4. That for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated.

ANSWER NO.

5. That Dock McCoy has borderline intellectual functioning with a IQ test score of 74.

ANSWER YES.

6. That Dock McCoy's mental and emotional disturbance is aggravated by his poor physical health.

ANSWER NO.

7. Dock McCoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

ANSWER NO.

8. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER NO.

ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO, "YES." IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

Issue Three:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER YES.

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently subetantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER YES.

IF YOU ANSWER FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE FOUR "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Dock McCoy, be sentenced to DEATH.

This the 8 day of AUGUST, 1985.

/s/ Walter K. Wild (signature)
Foreman of the Jury

IN THE SUPREME COURT OF NORTH CAROLINA

No. 585A85—Stanly

STATE OF NORTH CAROLINA

v.

DOCK MCKOY, JR. a/k/a DOCK MCCOY a/k/a DOCK MCKAY a/k/a PAUL MCCOY

Appeal by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by Freeman, J., at the 29 July 1985 session of Superior Court, Stanly County. Heard in the Supreme Court 14 March 1988; additional arguments heard 22 August 1988.

LACY H. THORNBURG, Attorney General, by STEVEN F. BRYANT, Assistant Attorney General, for the State (original brief and argument); LACY H. THORNBURG, Attorney General, JAMES J. COMAN, Senior Deputy Attorney General, WILLIAM N. FARRELL, JR., Special Deputy Attorney General, JOAN H. BYERS, Special Deputy Attorney General, STEVEN F. BRYANT, Assistant Attorney General, and BARRY S. McNEILL, Assistant Attorney General, for the State (supplemental brief and argument).

MALCOLM RAY HUNTER, JR., Appellate Defender, by DAVID W. DOREY, Assistant Appellate Defender, for defendant-appellant (original brief and argument); MALCOLM RAY HUNTER, JR., Appellate Defender, and LOUIS D. BILIONIS, for defendant-appellant (supplemental brief and argument).

E. ANN CHRISTIAN and ROBERT E. ZAYTOUN for North Carolina Academy of Trial Lawyers, amicus curiae.

JOHN A. DUSENBURY, JR., for North Carolina Association of Black Lawyers, amicus curiae.

WHICHARD, Justice.

Defendant was convicted of the first degree murder of Deputy William Kress Horne of the Anson County Sheriff's Department. The jury found as aggravating circumstances that defendant previously had been convicted of a felony involving violence and that the murder was committed against a deputy sheriff while engaged in the performance of official duties. It found as mitigating circumstances that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired and that defendant has borderline intellectual functioning.

The jury recommended the death penalty, and the trial court sentenced accordingly. We find no error.

Haywood Haskell lived beside defendant outside of Wadesboro. On 22 December 1984, Haskell was working on his wife's car. He observed defendant fire two shots into the air. Haskell suggested that defendant's shooting could endanger the neighborhood children, but defendant responded that "everybody else is shooting" and "well, it's Christmas."

Haskell telephoned the Anson County Sheriff's Department, and Deputy Calvin Lambert responded. After discussing the situation with Haskell, Lambert walked onto defendant's porch and attempted to talk with him. Lambert asked defendant to step out onto the porch, but defendant remained inside. Lambert told defendant not to shoot his gun because he was drunk and might hurt someone. He then returned to his car and observed defendant's home for several minutes before leaving the area.

Later, Haskell saw defendant lying in front of his outhouse. Because defendant could not stand unaided, a neighbor helped him to his house. Defendant had locked himself out, and the neighbor helped him gain entry by prying open a window. A few minutes later defendant hailed Duke Cox, a neighborhood teenager, and asked Cox to help him fix the window. Cox attempted to help, but he soon left because defendant refused to provide a hammer. When Cox walked away, defendant accused him of stealing some money and fired three shots in his direction.

Prompted by this incident, Haskell again called the sheriff's department. Deputies Robert Usery and Kress Horne responded. They asked defendant to come outside; defendant responded by threatening to kill them if they did not leave. More officers arrived, and Usery decided to investigate in back of defendant's house while Horne stood behind the patrol car and continued to talk to defendant. While Usery circled behind defendant's house, Horne drew his revolver and braced himself across the patrol car. Defendant pushed open his screen door and fired one shot that hit Horne in the face. Horne later died from the resultant injuries.

The other officers surrounded the house, and Usery advised defendant that he would use tear gas if defendant did not come out. Hearing no response, Usery threw a tear gas canister into the house. After defendant fired two shots, the officers returned a short burst of fire. Defendant then walked out, and the officers took him into custody. Because defendant was bleeding from two wounds, the officers transported him to the Anson County Hospital.

There, Dr. Merceda Perry examined defendant. Perry found two bullet wounds, and he noticed a strong odor of alcohol. He treated a puncture wound on defendant's buttocks and a deep laceration on his forehead, which he

closed with sutures. Initially, Perry found that defendant responded incoherently to his questions. At approximately 6:30 p.m., Perry ordered a blood alcohol test which indicated that defendant's blood alcohol level was equivalent to a .26 reading on the breathalyzer scale. Although defendant remained intoxicated, he had become more coherent by 7:20 p.m., the last time Perry saw him. In Perry's opinion, defendant would have become more coherent still by 8:30 p.m. At 8:15 p.m., Perry released defendant into the custody of S.B.I. Agent Carl Jackson for delivery to Central Prison in Raleigh.

Jackson and two deputy sheriffs placed defendant in a van and drove him to the sheriff's department, where warrants were served on him. They then drove toward Raleigh. When defendant complained that he was thirsty, the officers purchased two soft drinks, which defendant consumed. Jackson read defendant his rights, and defendant orally agreed to waive them. Defendant refused to sign a written waiver because his head injury prevented him from seeing the waiver form. Defendant made several statements during the trip admitting that he killed Deputy Horne because Horne "pressured" him.

GUILT PHASE

Defendant contends that the jury's verdict of guilt, and its conclusion that death is the appropriate punishment, are "fatally undermined" by the fact that both the trial court and the prosecutor informed the jury that the trial was subject to appellate review. The factual basis of the argument is as follows:

First, at the outset of the trial the court identified the court reporter to the jurors and explained:

> The lady right down here in front of me in the blue dress is Melody Courtney. She's a court reporter. She will be taking down everything that's said or done during the trial so that everything is a matter of public record and then she can type up a transcript of a trial and they mail it down to the Supreme Court and the Supreme Court can review what we're doing up here in Stanly County.

Defendant did not object to this statement, and the court continued its general explanation of the duties of various court personnel.

Second, in his closing guilt-phase argument, the prosecutor stated the following:

> And you may say, well, what is our role? Now, the Judge will tell you what your role as a trial juror happens to be. As we understand your role, you are the finders of fact, simply that. You don't decide what the law is. You don't interpret the law. The law is given to you by the Judge and he tells you what the meaning of that law is, and he will tell you how you—he will tell you how to apply that law which he gives to you to the facts that you have found from the sworn testimony.
>
> The jury is simply a fact—a body that finds facts. That's all you're here for. There is no appeal in your finding of facts. There is a right of appeal to any interpretation of laws and application of laws which are present in this case. The defendant, if convicted, as we say he certainly should be from the evidence and under the law, he can appeal on points of law,—
>
> MR. STOKES: OBJECTION.
>
> MR. LOWDER: —questions of law,—
>
> THE COURT: OVERRULED.
>
> MR. LOWDER: —but he cannot appeal from your findings of fact.

The legal basis of defendant's argument is grounded, essentially, in this Court's decisions in State v. White,

286 N.C. 395, 211 S.E.2d 445 (1975) and State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979), and in the United States Supreme Court's decision in Caldwell v. Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231 (1985). The pertinent aspects of these cases are as follows:

In *White*, the prosecutor argued:

> "[Y]ou will answer the question whether this defendant is guilty of first degree murder. If found guilty, he gets an automatic appeal to the Supreme Court of North Carolina—it is necessary. If any error is made in this court, that Court will say."

White, 286 N.C. at 402, 211 S.E.2d at 449. The trial court sustained defendant's objection and instructed the jury: "[D]on't consider what he said about the Supreme Court." Later, as it began its charge, the court gave the following instruction:

> "I want to go back to the argument that was objected to in the argument of counsel that the Supreme Court has a right to send this case back on mistakes. The reason I sustained that objection, I want you all to understand is that the Supreme Court will review this case. That they would only send the case back if I made a mistake on a legal question. They will not review the decisions of the facts by the jury. The jury is the sole trier of the facts of this lawsuit.

Id. at 402-03, 211 S.E.2d at 449. I explained that an argument suggesting that the jury can "depend upon either judicial or executive review to correct any errors in their verdict, and to share their responsibility for it, is an abuse of privilege and prejudicial to the defendant." *Id.* at 403. 211 S.E.2d at 450. The prosecutor's argument, we said, "was clearly intended to overcome the jurors natural reluctance to render a verdict of guilty of murder in the first degree by diluting their responsibility for the consequences." *Id.* at 402-03, 211 S.E.2d at 450. While the court accurately stated that this Court will only review questions of law, the instructions were nonetheless held inadequate to cure the impropriety because they "did not fully enlighten the jury as to the nature of the Supreme Court's review of a case on appeal and as to the difference between triers of the facts and judges of the law." *Id.* Moreover, we said, the jury probably understood the statement that "the Supreme Court will review this case" to mean that the trial court assumed that there would be a guilty verdict. *Id.* at 404, 211 S.E.2d at 450-51. For these reasons, we granted the defendant a new trial. *Id.* at 404, 211 S.E.2d at 451.

In *Jones*, the prosecutor argued: "[I]f you do err in this case he [defendant] has the "right of appeal." Jones, 296 N.C. at 497, 251 S.E.2d at 427. Because an appellate court will not review the factfinder's verdict in the guilt phase, we observed that the prosecutor had made an inaccurate statement. Moreover, the argument's "overriding vice" was that it "effectively told the jurors that they could rely upon the Supreme Court to correct their verdict if it were wrongful or improper . . . ." *Id.* at 500, 251 S.E.2d at 428. We held that the argument could have caused the jury to believe that this Court would share its burden of reaching a verdict, and we thus granted defendant's request for a new trial. *Id.*

In *Caldwell*, the prosecutor argued to the jury: "[Y]our decision is not the final decision. . . . Your job is reviewable." Caldwell, 472 U.S. at 325, 86 L. Ed. 2d at 237. In addition, the trial court stated that the jury's decision would be "reviewable automatically as the death penalty commands." *Id.* The United States Supreme Court vacated defendant's death sentence, stating that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determin-

ing the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 86 L. Ed. 2d at 239.

These cases stand for the proposition that statements by the trial court or prosecutor that tend to dilute the jury's sense of responsibility for its determinations by suggesting that its verdict will be reviewed, or that the punishment imposed will be withheld, are impermissible and prejudicial. *See* 75 Am. Jur. 2d *Trial* § 230 (1974) ("[c]omments . . . on the power of the court to suspend sentence or to set the jury's verdict aside, or statements that a higher court has the power to review the finding of the jury on the weight of the evidence, are calculated to induce the jury to disregard their responsibility, and are improper."). That proposition is not implicated, however, by the facts here, which are distinguishable from those in the above cases.

In *White*, the prosecutor told the jury that "[if] any error is made *in this court*, [the Supreme] Court will say." White, 286 N.C. at 402, 211 S.E.2d at 449 (emphasis added). The jury clearly could have interpreted the phrase "in this court" to include its errors as well as the court's errors. Here, by contrast, the prosecutor clearly stated that defendant could not appeal from the jury's findings of fact.

Further, in *White* the court stated to the jury that "the Supreme Court *will* review this case." *Id.* at 402, 211 S.E.2d at 449 (emphasis added). This Court concluded that by that "positive statement . . . the jury was bound to have understood that the court assumed [that] their verdict would be guilty." *Id.* at 404, 211 S.E.2d at 450-51. Here, by contrast, the court only noted the possibility of appeal by stating—in the context of a routine explanation of the court reporter's duties—that "the Supreme Court *can* review" this case. (Emphasis added.) This statement implies no assumption of guilt and only conveys information commonly known. We conclude that

this brief comment—at the outset of the trial and in the context of an explanation of the court reporter's duties—could not have influenced, adversely to defendant, the jury's perception of its responsibility for its decisions.

Likewise, in *Jones*, the prosecutor argued to the jury: "[I]f you do err in this case he [defendant] has the right of appeal." Jones, 296 N.C. at 497, 251 S.E.2d at 427 (emphasis added). Here, as noted above, the prosecutor instead clearly stated that defendant could not appeal from the jury's findings of fact. The challenged argument was simply an explanation of the jury's function and of the application of the law to the facts.

Finally, in *Caldwell* the prosecutor argued to the jury: "[Y]our decision is not the final decision. . . . Your job is reviewable. . . . [T]he decision you render is automatically reviewable by the Supreme Court." Caldwell, 472 U.S. at 325-26, 86 L. Ed. 2d at 237. As noted above, the United States Supreme Court vacated the death sentence on the ground that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere." Caldwell, 472 U.S. at 328-29, 86 L. Ed. 2d at 239. It stated: "[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333, 86 L. Ed. 2d at 242.

Again, unlike in *Caldwell*, the prosecutor here did not argue that the jury's determination of defendant's guilt and punishment was not final. Instead, he clearly informed the jury that there was no appeal from its findings of fact. The risk condemned in *Caldwell*, *viz*, "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court," *id.* at 330, 86 L. Ed. 2d at 240, thus is not present here.

For the foregoing reasons, we do not find *White*, *Jones*, and *Caldwell* controlling. Instead, we conclude that this case is more like State v. Finch, 293 N.C. 132, 235 S.E.2d 819 (1977). The trial court in *Finch* remarked: "[T]ake what the court says about the law, and what it is in the case. *If the Court is wrong, then the Court of Appeals will let that be known. Somebody will straighten that out, but you take your instructions from the Court.*" *Id.* at 135, 235 S.E.2d at 821 (emphasis in original). We held that these statements did not suggest that the verdict would be reviewed or that the mandated punishment would be withheld; they simply informed the jury that the law, as stated by the trial court, could be reviewed. *Id.* at 137, 235 S.E.2d at 822.

Here, as in *Finch*, nothing in the statements by the court or the prosecutor could reasonably be construed to diminish the jury's responsibility for its decisions. The trial court only informed the jury that this Court "*can* review" the case. (Emphasis added.) "Mere reference to the process of appellate review does not invalidate a death sentence." Mazzan v. State, 733 P.2d 850, 851 (Nev. 1987). Viewed in context, the prosecutor's argument stressed the jury's role as the final factfinder rather than diluting its sense of responsibility for its verdict. *See id.* at 851 ("argument did not shift responsibility to the appellate court, but rather heightened the sentencing jury's awareness of the gravity of its task"); Riley v. State, 496 A.2d 997, 1025 (Del. 1985), *cert. denied*, 478 U.S. 1022, 92 L. Ed. 2d 743 (1986) ("In no sense may it reasonably be said that the prosecutor was either misstating the law, misleading the jury as to its role, or minimizing its sentencing responsibility."). We thus conclude that the trial court did not abuse its discretion by allowing the argument. State v. Huffstetler, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). These assignments of error are overruled.

Defendant next contends that the trial court erred by allowing the prosecutor, during voir dire, to "stake out" the jurors by obtaining commitments from them to disregard defendant's intoxication in determining the existence of premeditation and deliberation and to reject his voluntary intoxication defense. Defendant failed to object to the prosecutor's questions at trial. Ordinarily, such failure constitutes a waiver of the right to assert the alleged error on appeal. State v. Oliver, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983). However, in light of our practice of scrupulous review in death sentence cases "to the end [that] it may affirmatively appear that all proper safeguards" have been afforded the defendant, State v. Whitley, 288 N.C. 106, 108, 215 S.E.2d 568, 570 (1975) (quoting State v. Fowler, 270 N.C. 468, 469, 155 S.E.2d 83, 84 (1967)), we elect to review the issue.

The prosecutor asked several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. The questions varied slightly, but the thrust of each was:

> If it is shown to you from the evidence and beyond a reasonable doubt that defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to [a]ffect your verdict?

Each juror responded negatively to the question.

Counsel is allowed wide latitude in examining jurors on voir dire; regulation of the form of the questions lies within the trial court's discretion. State v. Vinson, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *modified as to death-penalty*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). A defendant seeking to establish reversible error must demonstrate prejudice as well as a clear abuse of that discretion. State v. Avery, 315 N.C. 1, 20, 337 S.E.2d 786, 797 (1985).

In *Vinson*, we explained:

> [H]ypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. . . . The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.
>
> Types of questions which have been considered improper include "those asking a juror what his verdict would be if the evidence were evenly balanced; if he had a reasonable doubt of a defendant's guilt; if he were convinced beyond a reasonable doubt of a defendant's guilt; or questions asking him whether he would, in a specified hypothetical situation, vote in favor of the death penalty. . . ."

Vinson, 287 N.C. at 336-37, 215 S.E.2d at 68 (citations omitted); *accord* State v. Avery, 315 N.C. at 20, 337 S.E.2d at 797.

The questions here were properly allowed as an inquiry into the jurors' sympathies toward an intoxicated person. They did not contain incorrect or inadequate statements of law, nor were they ambiguous or confusing. Moreover, they did not tend to "stake out" the jurors as to their potential verdict or how they would vote under a given state of facts. The questions did not "fish for answers to legal questions before the judge ha[d] instructed the jury." State v. Clark, 319 N.C. 215, 221, 353 S.E.2d 205, 208 (1987).

Addressing the propriety of similar questions, our Court of Appeals has upheld the State's questioning prospective jurors as to whether they could be fair and impartial

in a case involving a proposed sale of marijuana. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, *disc. rev. denied*, 297 N.C. 699, 259 S.E.2d 297 (1979). It held that the State's questions tended only to "secure impartial jurors," while not causing them to commit to a future course of action. *Id.* at 291-92, 254 S.E.2d at 653.

As in *Williams*, the prosecutor here was simply inquiring into the sympathies of prospective jurors in the exercise of his right to secure an unbiased jury. *See* State v. Lee, 292 N.C. 617, 621, 234 S.E.2d 574, 577 (1977) (State entitled to unbiased jury; primary purpose of voir dire is to secure such). A promise not to sympathize with a defendant because of his intoxication is not the equivalent of a commitment to ignore the effect of intoxication in the resolution of legal issues. The questions and responses did not "stake out" the jurors to disregard the trial court's instructions on the effect of intoxication in determining defendant's guilt or innocence, or his sentence, under the law applicable to the facts presented. We thus hold that the trial court did not abuse its discretion by failing *ex mero motu* to prohibit this line of questioning. *See* State v. Clark, 319 N.C. 215, 353 S.E.2d 205 (proper for prosecutor to ask prospective jurors if the fact that the State was relying on circumstantial evidence would cause them any problems); State v. Hedgepeth, 66 N.C. App. 390, 310 S.E.2d 920 (1984) (proper for defense counsel to ask prospective jurors if they could follow instructions to consider defendant's criminal record only in determining his credibility).

Defendant next assigns error to the trial court's refusal to suppress evidence of his inculpatory post-arrest statements. He argues that he did not make a voluntary waiver of his *Miranda* rights and did not make his statements voluntarily.

After a voir dire hearing to determine the admissibility of defendant's statements, the trial court made

findings of fact and conclusions of law, in pertinent part, as follows:

> [T]hat the defendant was arrested at the scene of the crime . . . [at] approximately six o'clock p.m. on December the 22nd, 1984; that he was charged with assault with a deadly weapon with intent to kill, three counts; that he was thereafter taken to the Anson County Hospital and treated for a wound to his head and to his buttocks; and that he was thereafter taken by van to . . . Central Prison for safekeeping; . . . that he was interrogated in the van enroute . . .; that the temperature and conditions inside the van were comfortable; . . .; that prior to any question or interrogation the defendant was advised of his constitutional rights . . .; that these rights were read to him; that he was advised of his rights at approximately 8:43 p.m., advised of his right to remain silent and [that] anything he said would be used against him as evidence in court, and advised of [his] right to have an attorney present before and during any questioning; that he was advised of a right to have an attorney appointed, if he couldn't afford one, the State . . . would appoint him one; that he was advised of his right to . . . stop answering questions at any time and not to resume until he had an attorney present if he wanted one; that he was advised of these rights by Special Agent Carl Jackson . . . of the [S.B.I.]; . . . that [Jackson] . . . was introduced as a law enforcement officer; and that the was also advised of his rights in the presence of Henry Watkins . . . and George Pratt . . . [;] . . . that the defendant replied orally in English that he understood all of this stuff, that he had been tried for his life in 1951, and that he had heard all of this stuff before, and that he understood his rights; that he stated that he did not want a lawyer present and that he stated that he would talk, but that he

> didn't want to sign anything because he could not see[;] . . . that he was interrogated in English by [Jackson] and at at later point questions were asked by [Watkins] and Pratt[;] . . . that the defendant is approximatelty sixty-five years old and he speaks and understands English[;] . . . that his educational background is very limited, that he has an I.Q. of approximately—betweten 74 and 89[;] . . . that his physical condition at the time of the interrogation was that he had been released from the hospital, that he had been treated for an injury to his eye; that his left eye was swollen shut; that he was blind in his right eye; that he had an injury to his hip from a gunshot wound; that both of these wounds had been treated by a physician at the Anson County Hospital; that he was in good condition otherwise; that he was sitting up and that other than the bandage he appeared basically [in] the same condition as he does in court today; that at one point . . . the defendant requested something to drink and . . . was provided with two soft drinks, which he consumed[;] . . . that the defendant had a slight to moderate odor of alcohol about his person and that at the time of the interrogation at 8:43 and thereafter that he was not under the influence of alcohol or drugs[;] . . . that the defendant was coherent, that he was understanding and that he was not confused and not complaining[;] . . . that the answers in relation to the questions asked were extremely reasonable, responsive and appropriate [;] . . . that no promises, offers of reward or inducement[s] by any law enforcement officers were made in order for the defendant to make a statement[;] . . . that there were no threats or suggest[ions] of violence or show of violence by any law enforcement officers made to persuade or induce the defendant to make a statement[;] . . . that the defendant made no statement desiring to stop the questions, but at one point he

did request to be allowed to rest, and that he was allowed to rest for approximately seventeen minutes[;] . . . that the defendant made no request for an attorney during any of the questioning, and that the defendant expressly stated he did not want an attorney present; that the defendant . . . expressly stated that he did understand his rights; that he was unable to sign the written waiver, but that he did, in fact, make an expressed oral waiver to [Jackson]. And based on these findings of fact the Court would conclude as a matter of law that under the totality of the circumstances none of the constitutional rights, neither Federal nor State, of the defendant were violated by his arrest, detention, interrogation, or confession; that there were no promises, offers of reward, or inducement[s] to the defendant to make a statement; that there were no threat[s] or suggest[ions] of violence or show of violence to persuade or induce the defendant to make a statement; that the statements made by the defendant to [Jackson] . . . were made freely, voluntarily and understandingly; that the defendant was in full understanding of his constitutional rights to remain silent, of his right to counsel, and all other rights; and that he freely, knowingly, intelligently and voluntarily waived each of those rights and thereupon made the statement to the officers above mentioned.

The court then overruled defendant's objection to admission of the statements.

Defendant contends that the above findings are not supported by the evidence. At a voir dire hearing on the admissibility of a confession, the trial court must determine whether the State has met its burden of showing by a preponderance of the evidence that the confession was voluntary. State v. Corley, 310 N.C. 40, 52, 311 S.E.2d 540, 547 (1984). However, appellate courts do not apply the preponderance of the evidence test. *Id.*

Rather, the findings are conclusive on appeal if they are supported by competent evidence in the record. *Id.*; State v. Perdue, 320 N.C. 51, 59, 357 S.E.2d 345, 350 (1987). Despite conflicting evidence, "[n]o reviewing court may properly set aside or modify those findings if so supported." State v. Jackson, 308 N.C. 549, 569, 304 S.E.2d 134, 145 (1983). However, the conclusions of law are fully reviewable. State v. Perdue, 320 N.C. at 59, 357 S.E.2d at 350.

At the voir dire hearing, the trial court heard testimony from Dr. Merceda Perry, S.B.I. Agent Carl Jackson, and Dr. Robert Rollins. Perry, a doctor at the Anson County Hospital, testified that:

Defendant arrived at the Anson County Hospital at around 6:30 p.m. Perry examined defendant and found that he had suffered a laceration to his forehead and a puncture wound to his buttocks. While these injuries are normally painful, defendant expressed only discomfort. Defendant appeared intoxicated, and he had difficulty answering questions coherently. Defendant did not receive any narcotic medication, and he was not hallucinating. A little after 6:30 p.m., defendant underwent a blood alcohol test which indicated a blood alcohol level equivalent to a .26 reading on the breathalyzer scale. To accelerate defendant's recovery from his intoxication, Perry administered intravenous fluids, dextrose and water. After defendant received these fluids, his mental and physical condition improved considerably; he became more coherent and cooperative. When Perry last saw defendant, around 7:20 or 7:25 p.m., defendant had become far more lucid than he was when Perry arrived. In Perry's opinion, defendant's condition would have continued to improve over the next hour. Perry released defendant from the hospital so that he could be transported to Raleigh.

S.B.I. Agent Jackson testified that:

Jackson and two deputy sheriffs picked up defendant at the Anson County Hospital. The officers first drove

their van to the Anson County Sheriff's Department where defendant was served with three warrants for assault with a deadly weapon with intent to kill. The officers then drove toward Raleigh to deliver defendant to Central Prison. Jackson advised defendant of his constitutional rights by reading from the S.B.I. interrogation form. In response, defendant stated: "I was tried for my life, and I understand all this stuff." At 8:43 p.m., Jackson read defendant an explicit waiver of rights. Defendant stated that he understood the waiver and that he would talk to the officers; however, he did not want to sign the waiver because he could not see it. After agreeing to waive his rights, defendant complained that he was thirsty, and the officers purchased two soft drinks, which defendant consumed.

Jackson made sure defendant knew he was talking with law enforcement officers. Jackson also informed defendant that they were transporting him to Central Prison for safekeeping. Jackson then began questioning defendant about the day's events. Defendant made incriminating statements that Jackson later recounted in his testimony to the jury. At 10:20 p.m., defendant wanted a break because he was tired, and Jackson stopped questioning him.

At 10:37 p.m., Jackson tapped defendant on the shoulder and asked if he was asleep. Defendant indicated that he was not sleeping and that he was cold; the officers covered him with a sheet and turned up the heat. Jackson asked defendant to continue his story, but defendant became annoyed with Jackson. The other officers asked defendant if he would answer their questions, and defendant agreed. Defendant proceeded to make further incriminating statements that Jackson related to the jury. In particular, defendant explained that he shot Deputy Horne because "he pressured me the wrong way." An officer asked defendant if he was fearing for his life, and defendant replied: "I'm fearing for my life right

now." After the officers assured defendant that he was in no danger, the discussion continued. At 10:55 p.m., defendant remarked that he was tired and his hip was beginning to hurt. The officers then terminated the interview.

During the interview defendant appeared rational, and his statements made sense. Defendant was able to sit upright in the van by himself. Defendant did complain about stiffness in his hip. He appeared sober despite a slight to moderate odor of alcohol about his person.

Defendant is blind in his right eye, and his left eye was swollen shut because of the injury to his forehead. When defendant complained of being cold, the officers turned up the heat and maintained a comfortable temperature in the van. Jackson did not offer defendant any reward in return for a statement. Jackson did not coerce or pressure him to make a statement. Defendant never asked for an attorney. Jackson knew that defendant had been convicted of first degree murder in 1951 and felonious assault with intent to kill in 1977.

Robert Rollins, a forensic psychiatrist, testified that:

Defendant suffers from mixed personality disorder including features of paranoid thinking, impaired abstract thinking, impaired judgment and impaired perception. He also suffers from organic delusional syndrome, manifested by false beliefs. Generally anti-social, defendant tends to overreact violently to perceived threats. Defendant engages in episodic alcohol abuse, but, according to defendant's supervisor, he was a good worker who did not drink on the job. When defendant was admitted to Dorothea Dix Hospital in February 1985, he achieved an I.Q. test score of seventy-four, which places him in the "borderline range of intellectual functioning." However, he did achieve an I.Q. score of eighty-nine in May 1980.

Based on Dr. Perry's description of defendant's condition and treatment on the night of the shooting, Rollins believed that defendant's intoxicated condition would have

improved over time. Nonetheless, defendant would have been substantially intoxicated when the interrogation took place, and this intoxication would have exacerbated defendant's mental disabilities. Because of his mental disorders, defendant would not have been capable of voluntarily waiving his rights at the time of the interview.

The above voir dire testimony establishes that the pertinent findings are supported by competent evidence. They thus are binding on this Court. State v. Perdue, 320 N.C. at 59, 357 S.E.2d at 350.

In addition to a general challenge to the findings, defendant specifically disputes the finding that he made an express waiver of his rights. He contends that, rather than merely declining to sign a waiver he could not see, he in fact refused to waive his rights. Agent Jackson explicitly testified, however, that defendant stated that he understood his rights and agreed to talk with the officers. This evidence supports the trial court's finding.

Defendant also specifically challenges the finding that he never expressed a desire to terminate the interview; he contends that he invoked his rights by asking the officers to terminate the questioning at 10:20 p.m. Jackson expressly testified, however, that defendant wanted to take a break because he was tired, and that he subsequently agreed to resume the conversation. Thus, the finding is again supported by the evidence.

Defendant further contends that the findings do not support the conclusions that he made a voluntary confession and waiver of his *Miranda* rights. While the findings, if supported by evidence, are binding upon this Court, the conclusions of law are fully reviewable. *Id.* The legal significance of the findings is a question of law for this Court. State v. Jackson, 308 N.C. at 582, 304 S.E.2d at 152.

In determining the voluntariness of the confession and the waiver of *Miranda* rights, we look to the totality of

the circumstances. *Id.* at 581, 304 S.E.2d at 152. However, police coercion is a necessary predicate to a determination that a waiver or statement was not given voluntarily within the meaning of the Due Process Clause of the Fourteenth Amendment. Colorado v. Connelly, 479 U.S. ——, 93 L. Ed. 2d 473 (1986). Because the purported waiver and the statement arose within the same set of circumstances, we discuss the voluntariness of the confession as a single issue. *Cf.* State v. Corley, 310 N.C. at 48, 311 S.E.2d at 545 (despite compliance with *Miranda*, ultimate question determining admissibility of confession is whether it in fact was made voluntarily).

Defendant previously had been convicted of two felonies. He told Agent Jackson that because of this experience, he understood "all this stuff" (*i.e.*, his rights). Prior experience with the criminal justice system "is an important consideration in determining whether an inculpatory statement was made voluntarily and understandingly." State v. Fincher, 309 N.C. 1, 20, 305 S.E.2d 685, 697 (1983) (defendant's one prior arrest considered significant in determining voluntariness of confession); *see also* State v. Jackson, 308 N.C. at 582, 304 S.E.2d at 153. This circumstance thus supports the conclusions that the waiver and the confession were voluntary.

While intoxication is a circumstance critical to the issue of voluntariness, intoxication at the time of a confession does not necessarily render it involuntary. State v. Perdue, 320 N.C. at 59-60, 357 S.E.2d at 350-51. It is simply a factor to be considered in determining voluntariness. *See* Annot. "Sufficiency of Showing that Voluntariness of Confession or Admission was Affected by Alcohol or Other Drugs," 25 A.L.R. 4th 419 (1983 and Supp. 1987). The confession "is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." State v. Oxendine, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981).

At about 6:30 p.m. defendant had a blood alcohol level equivalent to a .26 reading on the breathalyzer scale, and he appeared intoxicated. Dr. Perry administered fluids to defendant to accelerate his recovery from his intoxication. During the next hour, Perry observed considerable improvement in defendant's mental and physical condition. Both Perry and Rollins agreed that defendant's condition would have continued to improve over time. The officers did not begin questioning defendant until some two hours after the blood alcohol test. Agent Jackson explicitly testified that defendant appeared to be sober during the interview. Jackson also stated that defendant spoke rationally and coherently. The trial court specifically found that defendant was not under the influence of alcohol during the interview. There was ample evidence to support this finding. *See* State v. McClure, 280 N.C. 288, 291, 185 S.E.2d 693, 695 (1972). Therefore, the fact that defendant may have experienced some lingering, mild intoxication at the time of the confession did not preclude the conclusion that he confessed voluntarily. State v. Perdue, 320 N.C. at 59-60, 357 S.E.2d at 350-51; *see also* Bryant v. State, 16 Ark. App. 45, 696 S.W.2d 773 (1985) (less than an hour after defendant signed a waiver of his *Miranda* rights, he had a blood alcohol level of .28; waiver held voluntary). Rather, defendant's intoxication was relevant to his credibility, which was a question for the jury. State v. McClure, 280 N.C. at 290-91, 185 S.E.2d at 695 (citing State v. Logner, 266 N.C. 238, 145 S.E.2d 867, *cert. denied*, 384 U.S. 1013, 16 L. Ed. 2d 1032 (1966)).

While important, subnormal mentality—standing alone —will not render a confession inadmissible. State v. Taylor, 290 N.C. 220, 231, 226 S.E.2d 23, 29 (1976) (citing State v. Thompson, 287 N.C. 303, 318, 214 S.E.2d 742, 752 (1975), *modified as to death penalty*, 428 U.S. 908, 49 L. Ed. 2d 1213 (1976)). If a person has the mental capacity to testify and to understand the meaning of his statements, he has sufficient mental capacity to make a voluntary confession. *Id.*

Rollins testified that defendant's I.Q. placed him in the borderline range of intellectual functioning; however, there was no testimony that defendant did not have sufficient intelligence to understand the meaning of his words. Moreover, Perry reported that after defendant received fluids he responded coherently to questions. Defendant spoke rationally during his extensive conversation with the officers. He held a job prior to the shooting, and his supervisor described him as a good worker. He also had sufficient mental capacity to testify at trial. The evidence thus permitted a conclusion that defendant had sufficient mental capacity to waive his rights and voluntarily confess.

Rollins testified that defendant's mental disorders would prevent him from making a truly voluntary confession. However, Jackson had ample opportunity to observe defendant at the time the waiver and statements were made, and he gave substantial testimony indicating that defendant was able to comprehend the discussion. When a non-expert has had a reasonable opportunity to observe a defendant and to form an opinion based on such observation, he may testify as to his opinion of the defendant's mental condition. State v. Taylor, 290 N.C. at 232, 226 S.E.2d at 30. The evidence thus did not preclude a conclusion that defendant's mental disorders did not prevent his making a voluntary confession.

The evidence did not indicate that defendant's blindness or injuries at the time of his confession had any bearing on the voluntariness of his waiver and statement. They were not shown to have precluded understanding or a free exercise of the will. *Cf.* State v. White, 291 N.C. 118, 123, 229 S.E.2d 152, 155 (1976) ("Illiteracy does not preclude understanding or a free exercise of the will.").

Finally, we note the absence of circumstances that we have often emphasized in our consideration of voluntariness:

> [Defendant] was not deceived or tricked about the nature of the crime involved or the possible punishment. . . . He was not subjected to prolonged uninterrupted interrogation. He was not subjected to physical threats or shows of violence. No promises were made to him in return for his confession.

State v. Jackson, 308 N.C. at 582, 304 S.E.2d at 152-53 (citations omitted). The absence of these circumstances supports the conclusion that the waiver and statements were made voluntarily. *See Colorado v. Connelly*, 479 U.S. ——, 93 L. Ed. 2d 473.

For the foregoing reasons, after a thorough review of the record we conclude that the totality of the circumstances permitted the trial court's conclusion that defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights and that his statements were made freely, understandingly, and voluntarily. We thus find no error in the denial of defendant's motion to suppress these statements.

Defendant next challenges the overruling of his objection to the prosecutor's argument concerning the expert testimony of defendant's psychiatrists. The prosecutor argued:

> Well, I want to tell you this about psychiatric testimony. If they were the so-called experts of all times and if the law recognized them as the expert[s] on what the condition of somebody's mind was, you wouldn't be hearing the case.
>
> MR. STOKES: OBJECT.
>
> THE COURT: OVERRULED. Go ahead
>
> MR. LOWDER: The law says that you may hear from the so-called expert witnesses, yes, and you can consider that, but it also says that you may take into account what other people have said about him. We've had other witnesses that told you about him. We had his neighbor right across the street to tell you how he was acting on this day.

Defendant contends that under N.C.G.S. § 8C-1, Rule 702, the law does recognize an expert forensic psychiatrist, qualified and accepted by the court, as an expert witness on "what the condition of somebody's mind was." He asserts that the prosecutor deliberately misstated the law in order to mislead the jury.

It is well-established in this jurisdiction that "[t]estimony regarding mental capacity is not confined to expert witnesses alone." State v. Evangelista, 319 N.C. 152, 162, 353 S.E.2d 375, 382-83 (1987). "Anyone who has had a reasonable opportunity to form an opinion is permitted to give his opinion upon the issue of mental capacity." *Id.* at 162, 353 S.E.2d at 383; *see also* State v. Davis, 321 N.C. 52, 55-58, 361 S.E.2d 724, 726-27 (1987). The evidence here included both expert and non-expert opinion testimony on defendant's sanity at the time of the shooting. The argument in question was an exhortation to the jury to consider both kinds of testimony in resolving this question.

In isolation, the statement "if the law recognized them [psychiatrists] as the expert[s] on what the condition of somebody's mind was, you wouldn't be hearing the case" could be misleading. However, the prosecutor went on to state correctly that the law permits hearing from the experts and considering what they have to say. He then urged the jurors to consider not only the expert testimony but also that of the other witnesses. "Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury." State v. Huffstetler, 312

N.C. 92, 111, 322 S.E.2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). Viewed in context, the potentially misleading portion of the prosecutor's argument was not so "extreme and . . . clearly calculated to prejudice the jury" as to warrant a holding that the trial court abused its discretion in overruling defendant's objection.

Defendant next assigns error to the prosecutor's argument suggesting that the fact that defendant was competent to stand trial indicated that his insanity defense lacked merit. Defendant contends that this argument tended to confuse the jury by blending the issues of competency to stand trial and insanity.

Although potentially misleading, the argument did not misstate the law. It simply urged the jury to consider evidence of defendant's state of mind at the time of trial in passing upon his state of mind at the time of the shooting. The trial court gave clear and correct instructions on insanity. *See* State v. Evangelista, 319 N.C. at 161, 353 S.E.2d at 382. In light of the foregoing, we decline to find an abuse of discretion in the failure to sustain defendant's objection to the argument.

Defendant next contends that the trial court erred by sustaining the State's objection to a portion of his closing argument. Dr. Rollins had testified that defendant was legally insane at the time of the shooting and that he lacked the mental capacity to premeditate and deliberate the act. Addressing the relevance of Dr. Rollins' testimony, defense counsel argued:

> And he said too that at that time, on that evening, December the 22nd, 1984, that he could not premeditatedly [sic] or deliberate to shooting the deputy. That's what he said. How is that significant? His Honor—I believe he will charge you that in order for you to find the defendant guilty of first degree murder, that before you can do that, you've

> first got to be satisfied beyond a reasonable doubt [that] certain elements of the crime are met. Among those, one of the elements of first degree murder is that there was premeditation and deliberation, unlawful killing of a human being with premeditation and deliberation. Premeditation and deliberation. That thought went into it. That there was time to think, to reflect, to choose to do the thing.
>
> Dr. Rollins with all of his years of experience and with all of the work that went into his examination of Dock McCoy says he could not premeditate and deliberate at that time.
>
> You've got to find before you can convict this man of first degree murder not only could he but that he did, so, in effect, what you've got to find is that not only was Dr. Rollins wrong about it, but that he was wrong about it beyond a reasonable doubt.

The following then occurred:

> MR. LOWDER: We OBJECT to that.
>
> MR. STOKES: That's a fair comment.
>
> MR. LOWDER: We ask the Judge to rule on that objection.
>
> • • •
>
> THE COURT: I'll have to SUSTAIN that OBJECTION.

Defendant contends that his argument properly stated the proposition that the State bore the burden of proving beyond a reasonable doubt the premeditation and deliberation element of first degree murder. The State asserts that the argument implied that the State bore the burden of disproving the insanity defense, which is an inaccurate statement of our law. State v. Mize, 315 N.C. 285, 293-94, 337 S.E.2d 562, 567 (1985). We conclude that the

argument is reasonably subject to either of these interpretations. Although counsel should be allowed wide latitude in arguing to the jury, the control of the exercise of this privilege ordinarily lies in the sound discretion of the trial court. State v. Robbins, 319 N.C. 465, 505, 356 S.E.2d 279, 303, *cert. denied*, —— U.S. ——, 98 L. Ed. 2d 226 (1987). Because the jury could have intercepted defendant's argument to misstate the law as applied to the facts, we find no abuse of discretion in the sustaining of the objection.

Further, the charge correctly and unambiguously emphasized the State's burden of proving premeditation and deliberation beyond a reasonable doubt. *See* State v. Mize, 315 N.C. at 293. 337 S.E.2d at 567. In light of this, and in view of the record as a whole, we do not believe there is a reasonable possibility that the jury would have reached a different result if the court had overruled the objection. Thus, assuming error, *arguendo*, defendant has not carried his burden of showing prejudice. N.C.G.S. § 15A-1443(a) (1983).

We conclude that the guilt phase of defendant's trial was fair and free of prejudicial error.

SENTENCING PHASE

Defendant contends that he is entitled to a new sentencing hearing because the jury failed to find the statutory mitigating circumstance that "the defendant was under the influence of mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2) (1983). Defendant presented two psychiatrists who testified that he was suffering from significant psychological disorders at the time of the shooting. He argues that there thus was uncontradicted and inherently credible evidence to support the existence of this mitigating circumstance, and that the jury's refusal to find this circumstance makes the sentencing determination unreliable in violation of the Eighth and Fourteenth Amendments.

We conclude that other evidence regarding defendant's mental and emotional state at the time of the shooting conflicted with that presented by defendant's experts. Prior to the shooting, defendant had held the same job for four years, and his supervisor described him as a good employee. On the day of the shooting, defendant was able to aim and fire his shotgun. When confronted by Haskell, defendant was able to explain that he was firing his shotgun into the air because "it's Christmas." At several points prior to the shooting, defendant conversed with the officers. After receiving medical treatment for his gunshot wounds, defendant was able to answer Dr. Perry's questions coherently. During the ride to Raleigh, defendant "appeared to be rational in all respects." Defendant gave a detailed narration of the day's events, and he explained that the reason he shot Horne was because Horne "pressured" him. Agent Jackson testified that defendant responded logically, and with clarity of recollection and expression, to questions posed by the officers. Defendant's own witness, Dr. Lara, testified that he found no evidence that defendant suffered from hallucinations, delusions, or "an ongoing psychosis."

We also reject defendant's assertion that the testimony of his psychiatric experts was inherently credible. Defendant's mental and emotional state *at the time of the crime* is the central question presented by the submission of the mitigating circumstance in question; however, neither of defendant's experts examined him until several weeks or months after the crime. *See* State v. Smith, 305 N.C. 691, 705-06, 292 S.E.2d 264, 273-74, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982) (State's evidence concerning defendant's mental capacity conflicted with defendant's expert's after-the-fact opinions; "jury's duty to decide what to believe"). The jury was not required to believe defendant's evidence simply because the State did not specifically refute the testimony of defendant's experts. "Determining the credibility of evidence is at the heart of the fact-finding function."

State v. Jones, 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983).

Because the evidence concerning defendant's mental and emotional state was neither uncontradicted nor inherently credible, we find no merit in this argument. *See* State v. Smith, 305 N.C. at 706, 292 S.E.2d at 274 ("all of the evidence" did not support the existence of a mitigating circumstance; defendant thus not entitled to peremptory instruction thereon).

Defendant next contends that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's allowing the District Attorney, in closing argument, to remind the jurors of their commitments not to have sympathy for defendant because he was intoxicated. The argument was as follows:

> Number seven, [defendant's] ability to remember the events of December the 22nd, 1984, is actually impaired, they contend. And that's the last one. I don't know. He was drinking liquor and I told you before you were chosen as a juror that if it is shown that he's intoxicated, were you going to have sympathy, sympathetic to his cause. As I recall, you said you wouldn't. I don't know. He can remember what he did because he told the officers about it.

Defendant did not object to this argument at trial. We thus can find an abuse of discretion in the trial court's failure to intervene *ex mero motu* only if impropriety in the argument was "gross indeed." State v. Johnson, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979). We find no gross impropriety. We have held above that the trial court did not abuse its discretion by failing *ex mero motu* to prohibit voir dire questions to prospective jurors regarding their sympathies toward an intoxicated person. We likewise find no abuse of discretion in the trial court's allowing the District Attorney—

in closing argument, without objection—to gently remind the jurors of their responses to these questions.

Defendant next contends that the trial court's sentencing instructions were erroneous and unconstitutional because they required jury unanimity on the existence of a mitigating circumstance before that circumstance could be considered for the purpose of sentencing. We find no error.

We resolved this issue contrary to defendant's position in State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled on other grounds*, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988). In *Kirkley*, the trial court instructed the jury that "the defendant has the burden of persuading the jury as to the existence of any mitigating circumstance and if all twelve jurors are unable to agree that a specific mitigating circumstance exists they must find that it does not exist." Kirkley, 308 N.C. at 217-18, 302 S.E.2d at 156. Therefore, the jury could only find a mitigating circumstance if it unanimously agreed that it existed. The defendant argued that the court should have instructed that the jurors could only determine that a mitigating circumstance did *not* exist if they unanimously found that it did not exist. *Id.* at 218, 302 S.E. 2d at 157.

We held that in a capital case "the jury must unanimously find that an aggravating circumstance exists before that circumstance may be considered by the jury in determining its sentence recommendation" and that "consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." *Id.* We stated:

> The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances. The unanimity requirement is only placed upon the finding of whether an aggravating

or mitigating circumstance exists. With the exceptions of who has the burden of proof and the different quantum of proof required to establish the existence of a circumstance, we see no reason to distinguish the method a jury must use in finding the existence or nonexistence of aggravating and mitigating circumstances during the sentencing procedure. It must be kept in mind that when the sentencing procedure begins there are no aggravating or mitigating circumstances deemed to be in existence. Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case.

In determining whether a mitigating circumstance exists, the jury is free to consider all the evidence relevant to that circumstance. This procedure is in accord with the requirements of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) and Eddings v. Oklahoma, —— U.S. ——, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). We therefore find no error in the trial judge's instructions to the jury concerning the unanimity requirement on mitigating circumstances.

Id. at 219, 302 S.E.2d at 157.

We have declined to reexamine our *Kirkley* holding in several cases, including the following: State v. Lloyd, 321 N.C. 301, 364 S.E.2d 316 (1988); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, —— U.S. ——, 100 L. Ed. 2d 935 (1988); State v. Brown, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, —— U.S. ——, 98 L. Ed. 2d 406 (1987); State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985); State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984); State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

As a matter of state law, then, this issue is clearly settled contrary to defendant's position. Defendant contends, however, that the recent decision of the United States Supreme Court in Mills v. Maryland, 486 U.S. ——, 100 L. Ed. 2d 384 (1988), requires that we overrule *Kirkley* and its progeny. In *Mills*, the Supreme Court held that the trial court's instructions to the jury were constitutionally infirm because "reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at ——, 100 L. Ed. 2d at 400.

Mills is one of a long line of cases in which the United States Supreme Court has examined the constitutionality of state capital-sentencing schemes. The Court has faced the tensions between two concerns relating to such schemes: the constitutional requirement of individualized sentencing, and the constitutional requirement that the death penalty not be inflicted arbitrarily and capriciously. In Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), the Court recognized that "[t]he signals from this Court have not . . . always been easy to decipher" and that it had "an obligation to reconcile previously differing views in order to provide [clear] guidance." Lockett, 438 U.S. at 602, 57 L. Ed. 2d at 988 (plurality opinion).

The plurality opinion in *Lockett* explained how, in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346 (1972), a plurality of the Court had concluded that "discretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment" because it was discriminatory, "wantonly" imposed and "afforded 'no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not.'" Lockett, 438 U.S. at 599, 57 L. Ed. 2d at 986 (quoting Furman, 408 U.S. at 257, 310, 313, 33 L. Ed. 2d at 359, 390, 392). In attempting to follow *Furman*,

some states adopted mandatory death penalties for certain crimes, thus eliminating any jury discretion in sentencing. Lockett, 438 U.S. at 599-600, 57 L. Ed. 2d at 986-87.

In the wake of *Furman*, the Court examined death penalty statutes in five states. A plurality found the mandatory death sentence statutes in Louisiana and North Carolina unconstitutional. Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974 (1976); Woodson v. North Carolina, 428 U.S. 280, 49 L. Ed. 2d 944 (1976). A plurality also found, however, that the Georgia, Texas, and Florida statutes, which were not mandatory and which provided certain safeguards to the defendant in the capital-sentencing process, were not constitutionally invalid. Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859 (1976); Jurek v. Texas, 428 U.S. 262, 49 L. Ed. 2d 929 (1976); Proffitt v. Florida, 428 U.S. 242, 49 L. Ed. 2d 913 (1976). In *Gregg*, the plurality wrote that "the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Gregg, 428 U.S. at 195, 49 L. Ed. 2d at 887. From these opinions, the plurality opinion in *Lockett* concluded that "sentencing procedures should not create 'a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner.'" Lockett, 438 U.S. at 601, 57 L. Ed. 2d at 987 (quoting Gregg, 428 U.S. at 188, 49 L. Ed. 2d at 883).

> In the view of the three Justices, . . . Furman did not require that all sentencing discretion be eliminated, but only that it be "directed and limited," 428 U.S., at 189, 49 L. Ed. 2d 859, 96 S. Ct. 2909, so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many cases in which it is not." Id., at 188, 49 L. Ed. 2d 859, 96 S. Ct. 2909.

Lockett, 438 U.S. at 601, 57 L. Ed. 2d at 987-88.

The plurality opinion in *Lockett* acknowledged that mandatory death sentencing was unconstitutional. "[T]he sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" Lockett, 438 U.S. at 601, 57 L. Ed. 2d at 988 (quoting Woodson v. North Carolina, 428 U.S. at 304, 49 L. Ed. 2d at 961 (plurality opinion)). The opinion stated that "the sentencer . . . [may] not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604, 57 L. Ed. 2d at 990 (emphasis in original).

Ohio's death-penalty statute, which the Court examined in *Lockett*, mandated the imposition of the death penalty where a jury had found at least one aggravating circumstance unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the court determined that at least one of three specified mitigating circumstances had been established by a preponderance of the evidence. *Id.* at 607, 57 L. Ed. 2d at 991-92. The plurality opinion concluded that "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments" because it "preclude[d] consideration of relevant mitigating factors." *Id.* at 608, 57 L. Ed. 2d at 992. Therefore, the Court reversed the imposition of the death penalty and remanded for resentencing. *Id.* at 608-09, 57 L. Ed. 2d at 992.

In Eddings v. Oklahoma, 455 U.S. 104, 71 L. Ed. 2d 1 (1982), the Supreme Court applied the *Lockett* rule that

"the sentencer . . . [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 110, 71 L. Ed. 2d at 8 (quoting Lockett, 438 U.S. at 604, 57 L. Ed. 2d at 990) (emphasis in original). The trial judge in *Eddings* had stated that, as a matter of law, he could not take into consideration that the defendant had come from a violent background. Eddings, 455 U.S. at 112-13, 71 L. Ed. 2d at 9-10. The Supreme Court held that "the sentencer [may not] refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 114, 71 L. Ed. 2d at 11 (emphasis in original). The Court reversed the death sentence and remanded for resentencing. *Id.* at 117, 71 L. Ed. 2d at 12.

In Mills v. Maryland, 486 U.S. ——, 100 L. Ed. 2d 384, the Supreme Court applied the *Lockett-Eddings* doctrine in holding that because the instructions to the jury on mitigating circumstances were potentially misleading, "[t]he possibility that the . . . jury conducted its task improperly . . . [was] great enough to require resentencing." *Id.* at ——, 100 L. Ed. 2d at 399. The verdict in *Mills* had three sections:

Section I stated:

> Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked "yes" has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked "no" has not been proven BEYOND A REASONABLE DOUBT[.]

Id. at ——, 100 L. Ed. 2d at 400. Following this paragraph was a list of the submitted aggravating circumstances, each of which was followed by two blanks—one for a "yes" answer, the other for a "no" answer. Section I concluded:

> (If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no" do not complete Sections II and III.)

Id. at ——, 100 L. Ed. 2d at 400-01.

Section II stated:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked "no" has not been proven BY A PREPONDERANCE OF THE EVIDENCE[.]

Id. at ——, 100 L. Ed. 2d at 401. As in the first section, the proposed mitigating circumstances, numbered 1 through 7, were listed, each with blanks for "yes" and "no." Number 8 read, "Other mitigating circumstances exist, as set forth below." *Id.* at ——, 100 L. Ed. 2d at 401-02. Section II concluded:

> (If one or more of the above in Section II have been marked "yes," complete Section III. If all of the above in Section II are marked "no," you do not complete Section III.)

Id. at ——, 100 L. Ed. 2d at 402.

Section III read:

> Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

Blanks designated "yes" and "no" followed. *Id.* at ——, 100 L. Ed. 2d at 403.

The fourth and final section read:

DETERMINATION OF SENTENCE

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no" enter "Life Imprisonment."

2. If Section III was completed and was marked "yes" enter "Life Imprisonment."

3. If Section II was completed and all of the answers were marked "no" then enter "Death."

4. If Section III was completed and was marked "no" enter "Death."

Id. at ——, 100 L. Ed. 2d at 403.

In Section I, the jury answered "yes" to one of the aggravating circumstances and "no" to the rest. In Section II, it answered "no" to mitigating circumstances 1 through 7 and "none" to number 8 (the "catchall"). Having found no mitigating circumstances, the jury did not answer Section III. It returned a death sentence in response to the mandate of number three in the final section. *Id.* at ——, 100 L. Ed. 2d at 400-03.

This sentencing scheme mandated the death penalty if the jury unanimously found at least one aggravating circumstance and did not unanimously find any mitigating circumstances. Because the jury found one aggravating circumstance and not mitigating circumstances, it was required as a matter of law to impose the death penalty without completing Section III, which called for the weighing of aggravating and mitigating circumstances.

The defendant challenged his conviction and sentence, arguing that Maryland's capital-punishment statute was unconstitutionally mandatory as applied to him, because "even if some or all of the jurors were to believe *some*

mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the *same* mitigating factor, the sentence necessarily would be death." *Id.* at ——, 100 L. Ed. 2d at 392 (emphasis in original). The Supreme Court granted certiorari "[b]ecause of the importance of [this] issue in Maryland's capital-punishment scheme." *Id.* at ——, 100 L. Ed. 2d at 393.

After examining the verdict form and instructions under which the jury had sentenced the defendant to death, the Court concluded that even if the jurors had reached Section III, "they were not free . . . to consider *all* relevant evidence in mitigation as they balanced aggravating and mitigating circumstances. Section III instructed the jury to weigh only those mitigating circumstances marked 'yes' in Section II." *Id.* at ——, 100 L. Ed. 2d at 397 (emphasis in original).

> [T]here is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. . . . The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.

Id. at ——, 100 L. Ed. 2d at 400. Because of the risk that the jury was improperly precluded from considering certain *relevant* mitigating evidence, the Court held that the Maryland scheme violated the doctrine articulated in *Lockett* and *Eddings*. *See id.* at ——, 100 L. Ed. 2d at 400. Therefore, the Court vacated the judgment of the Court of Appeals, insofar as it sustained the death penalty, and remanded for resentencing. *Id.* at ——, 100 L. Ed. 2d at 400.

In Franklin v. Lynaugh, —— U.S. ——, 101 L. Ed. 2d 155 (1988), a case decided after *Mills*, the Supreme Court again examined Texas' capital-sentencing process. That process provided for the submission of two "Special Issues" to the jury. If the jury answered "yes" to both questions, the defendant would be sentenced to death. *Id.* at ——, 101 L. Ed. 2d at 162. The defendant in *Franklin* requested instructions that the jurors should take mitigating evidence into account in answering the Special Issues, so that they could answer "no" to either one or both of the Special Issues, even if they otherwise would have answered the Special Issues "yes." *Id.* at ——, 101 L. Ed. 2d at 162-63. The trial court instead instructed the jurors that they should reach their verdict based on all the evidence. *Id.* at ——, 101 L. Ed. 2d at 163. The defendant argued that the Special Issues precluded the jury from considering certain mitigating evidence. Even though the Texas capital-sentencing process does not mention mitigating evidence, *id.* at ——, 101 L. Ed. 2d at 177 (Stevens, J., dissenting), the plurality opinion held that the Texas procedure was not unconstitutional.

The plurality opinion stated that there are "two lines of cases . . . [which] are somewhat in 'tension' with each other"—the cases holding that the jury must not be precluded from considering all relevant evidence, and the cases holding that states must channel the exercise of jury discretion, *id.* at ——, 101 L. Ed. 2d at 171, and that the procedure in Texas "accommodates *both* of these concerns." *Id.* at ——, 101 L. Ed. 2d at 171 (emphasis in original). The plurality opinion concluded that "*Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of . . . mitigating factors." *Id.* at ——, 101 L. Ed. 2d at 169.

> [T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.

Id. at ——, 101 L. Ed. 2d at 170. States "must channel the [capital] sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.* at ——, 101 L. Ed. 2d at 170 (quoting Godfrey v. Georgia, 446 U.S. 420, 428, 64 L. Ed. 2d 398, 406 (1980) (plurality opinion) (footnotes omitted)).

Thus, the Supreme Court has given individual scrutiny to several states' capital-sentencing procedures to determine whether they were non-mandatory and allowed for individualized sentencing, yet adequately channeled the discretion of the sentencer. The Court has upheld some procedures—*see* Franklin v. Lynaugh, —— U.S. ——, 101 L. Ed. 2d 155; Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859; Jurek v. Texas, 428 U.S. 262, 49 L. Ed. 2d 929; Proffitt v. Florida, 428 U.S. 242, 49 L. Ed. 2d 913—while declaring others invalid—*see* Mills v. Maryland, 486 U.S. ——, 100 L. Ed. 2d 384; Eddings v. Oklahoma, 455 U.S. 104, 71 L. Ed. 2d 1; Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 973; Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974; Woodson v. North Carolina, 428 U.S. 280, 49 L. Ed. 2d 944. Therefore, in examining the aspect of our capital-sentencing process in question here, we must look at that aspect individually and in the context of the whole.

In the case now before us, the verdict form in the sentencing phase had four sections:

The first section, Issue One, listed the submitted aggravating circumstances and asked whether the jury unani-

mously found from the evidence the existence of any of those circumstances. The jury unanimously found the two aggravating circumstances submitted.

The second section, Issue Two, listed the submitted mitigating circumstances and asked whether the jury unanimously found from the evidence the existence of any of those circumstances. Of the eight mitigating circumstances submitted, the jury answered "yes" to two and "no" to six, including the catchall" ("[a]ny other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value").

The third section read:

> ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO "YES." IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

Issue Three stated:

> *Issue Three*: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?
>
> *Answer*:

The fourth section read:

> IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER THREE, "YES," PROCEED TO ISSUE FOUR.

Issue Four stated:

> Do you unanimously find, beyond a reasonable doubt, that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?
>
> *Answer*:

The jury answered "yes" to Issues Three and Four and returned a recommendation of the death penalty.

Our capital-sentencing procedure, as this case shows, differs in two significant ways from Maryland's procedure:

First, the instructions to the jury as to when it must impose the death penalty are different. Maryland's procedure required the jury to impose the death penalty if it "found" at least one aggravating circumstance and did not "find" any mitigating circumstances. It also required the jury to impose the death penalty if it unanimously found that the mitigating circumstances did not outweigh the aggravating circumstances. Issue Three here requires the jury to weigh the "found" mitigating circumstances against the "found" aggravating circumstances. In contrast to the Maryland procedure, however, it does not mandate the death penalty where there are no mitigating circumstances and at least one aggravating circumstance, nor does it mandate the death penalty if the mitigating circumstances do not outweigh the aggravating circumstances. Rather, it requires the jury then to answer Issue Four. Issue Four ensures that a jury may return a recommendation of life imprisonment if it feels that the aggravating circumstances are not sufficiently substantial to call for the death penalty, even if it has found several aggravating circumstances and no mitigating circumstances. Maryland's capital-sentencing procedure, which the Supreme Court found constitutionally infirm in *Mills*, did not include a section equivalent to Issue Four here.

Second, in North Carolina evidence in effect becomes legally irrelevant to prove mitigation if the defendant fails to prove to the satisfaction of all the jurors that

such evidence supports the finding of a mitigating factor. "Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case." State v. Kirkley, 308 N.C. 196, 218, 302 S.E.2d 144, 157 (1983). A requirement that the defendant must carry a certain evidentiary burden to prove the existence of a mitigating factor is a proper limitation of the jury's discretion. *See* Patterson v. New York, 432 U.S. 197, 201, 209, 53 L. Ed. 2d 281, 286-87, 291 (1977) (states normally have the power to regulate burdens of production and persuasion and "[i]f the State . . . chooses to recognize a factor that mitigates the degree of criminality or punishment, . . . the State may assure itself that the fact has been established with reasonable certainty"). The instructions and verdict form in our capital-sentencing procedures serve to channel the jury's discretion by ensuring that, when the jury makes its final sentencing determination, it will only consider evidence which we have, in effect, determined to be relevant. If all the jurors do not agree on the existence of a specific mitigating circumstance, then the defendant has failed to meet his or her burden of proof on that circumstance and the evidence regarding it is not legally relevant for sentencing purposes. Therefore, the instruction to the jury to weigh only the mitigating circumstances "found" by a unanimous vote was an instruction to consider only the *relevant* mitigating evidence in answering Issues Three and Four.

In *Mills*, the Maryland Court of Appeals had held that jurors could only mark "no" on a mitigating circumstance when they *unanimously* found that mitigating circumstance *not* to exist. Mills v. State, 310 Md. 33, 55, 527 A. 2d 3, 13 (1987). Where some, but not all, jurors agreed on the existence of a mitigating circumstance, the jury could not mark "no" to that circumstance; thus, unlike in North Carolina, the mitigating evidence introduced to support that mitigating circumstance remained

legally relevant even though the jurors did not agree unanimously on the existence of the mitigating circumstance.

The fact that such evidence remained legally relevant apparently was significant in the Supreme Court's resolution of *Mills*. The Court noted that "[n]o one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered legally 'irrelevant' by one holdout vote." Mills v. Maryland, —— U.S. at —— n.7, 100 L. Ed. 2d at 394 n.7. The Court went on to state that the problem in *Mills* was that in answering Section III of the verdict form, the jurors "were not free . . . to consider *all relevant evidence* in mitigation as they balanced aggravating and mitigating circumstances." *Id.* at ——, 100 L. Ed. 2d at 397 (emphasis added). The instructions in *Mills* were potentially misleading and thus inadequate because they did not clearly permit the jury to consider all relevant evidence. Under North Carolina law, the jury is not prevented from considering relevant mitigating evidence at any time during sentencing.

Like the United States Supreme Court, *see* Godfrey v. Georgia, 446 U.S. at 428, 64 L. Ed. 2d at 406, we have emphasized the need for guided discretion in the capital-sentencing process. In State v. Brown, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, —— U.S. ——, 98 L. Ed. 2d 406 (1987), the defendant argued that the trial court erroneously instructed the jury that it could only consider the "found" mitigating circumstances in weighing the mitigating and aggravating circumstances. He contended that the jury should have been able to consider circumstances not "found" by the jury and even circumstances which had not been written on the verdict form. *Id.* at 217, 358 S.E.2d at 25-26. We stated that such a procedure would "sanction an invitation to caprice" in the sentencing phase of a capital trial. *Id.* at 217, 358 S.E.2d at 26. We discussed the concern, often articulated by the

United States Supreme Court, that the jury's discretion must be limited to prevent arbitrary and capricious infliction of the death penalty:

> "The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances." There is no reason to confound the jury's decision process with arbitrary, "inarticulable" factors that may be applied in mitigation of a sentence but not in aggravation of it. "[T]he jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the 'carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused.'"

Id. at 217-18, 358 S.E.2d at 26 (citations omitted); *see also* State v. Kirkley, 308 N.C. at 219, 302 S.E.2d at 157.

Our capital-sentencing procedure allows for individualized sentencing. It allows the jury to find circumstances in mitigation, both submitted circumstances and any other circumstance the jury deems to have mitigating value. It allows the jury to consider all relevant evidence in deciding whether to recommend a sentence of death. Finally, it requires the jury—before recommending that the defendant be sentenced to death—to weigh the "found" aggravating and "found" mitigating circumstances and to decide whether the "found" aggravating circumstances, considered with the "found" mitigating circumstances, are sufficiently substantial to call for the death penalty.

In addition to allowing for individualized sentencing, our capital-sentencing procedure also guides the jury's discretion so as to guard against the arbitrary and capricious infliction of the death penalty. It requires the State to prove the existence of an aggravating circumstance beyond a reasonable doubt. It requires the defendant to prove the existence of a mitigating circumstance by a preponderance of the evidence. It then allows the jury to consider only that evidence which is relevant, *i.e.*, the evidence which the jury has unanimously "found," in sentencing the defendant.

Our capital-sentencing procedure thus provides a proper balance between individualized sentencing and guided discretion and therefore, we believe, conforms with federal constitutional requirements.

The Supreme Court granted certiorari in *Mills* "[b]ecause of the importance of the issue in Maryland's capital-punishment scheme." *Id.* at ——, 100 L. Ed. 2d at 393. The decision in *Mills* thus appears to be statute-specific. This conclusion is further supported by the Court's treatment of three cases immediately after the decision in *Mills*. The Court denied certiorari in two cases from this state which raised the issue of whether North Carolina's requirement of jury unanimity on the existence of mitigating circumstances is unconstitutional. *See* State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, —— U.S. ——, 100 L. Ed. 2d 935 (1988); State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1983), *cert. denied*, —— U.S. ——, 100 L. Ed. 2d 934 (1988). However, in a Maryland case raising the same issue as in *Mills*, the Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Mills*. *See* Jones v. Maryland, 310 Md. 569, 530 A.2d 743 (1987), *cert. granted and judgment vacated*, —— U.S. ——, 100 L. Ed. 2d 916 (1988). We recognize that "a denial of a petition for a writ of certiorari . . . carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." Maryland v. Baltimore Radio Show, 338 U.S. 912, 919, 94 L. Ed. 562, 566 (1950) (Frankfurter, J., opinion re: denial of certiorari); *see also* Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 944, 58 L. Ed. 2d 335, 336 (1978) (Stevens, J., opinion re: de-

nial of certiorari). We do not suggest that the denial of certiorari in *Holden* and *Gardner* alone indicates that the Court decided that the defendants' arguments in those cases were without merit. However, we view the Court's action on *Jones* and its different treatment of *Holden* and *Gardner*, all in the immediate wake of *Mills*, as some indication that our capital-sentencing procedure differs sufficiently from Maryland's that *Mills* does not control the question presented here.

In light of the foregoing precedent from the United States Supreme Court and from this Court, the differences between our capital-sentencing procedure and the Maryland procedure addressed by the Supreme Court in *Mills*, and the Supreme Court's treatment of *Jones*, *Holden*, and *Gardner* in the immediate wake of *Mills*, we are unable to conclude with any degree of certainty that *Mills* rendered our capital-sentencing procedure constitutionally infirm. We believe our clear, stable, considered procedure, established by *Kirkley* and adhered to in its progeny, is properly responsive to the requirement that capital-sentencing schemes provide for both individualized sentencing and guided sentencer discretion. We thus continue to adhere to our decisions in *Kirkley* and its progeny and hold that the instructions in question were without error.

Defendant raises the following "preservation" issues:

(1) He contends that the trial court erred in denying his motion to require the State to disclose potential aggravating circumstances it intended to rely upon at sentencing. Such disclosure is not required. State v. Holden, 321 N.C. 125, 153-54, 362 S.E.2d 513, 531 (1987), *cert. denied*, —— U.S. ——, 100 L. Ed. 2d 935 (1988).

(2) He contends that the trial court erred in placing the burden of proving the existence of mitigating circumstances on him rather than on the State. This was not error. State v. Brown, 320 N.C. 179, 216, 358 S.E.2d

1, 25, *cert. denied*, —— U.S. ——, 98 L. Ed. 2d 406 (1987).

(3) He contends that the trial court erred in instructing the jury that it must recommend a death sentence if it answered issue four [1] affirmatively. This was not error. State v. McDougall, 308 N.C. 1, 26, 301 S.E.2d 308, 323-24, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983).

(4) He contends that the trial court erred in sentencing him to death because N.C.G.S. § 15A-2000(e)(3) [2] is unconstitutionally vague and overbroad, both facially and as applied. The argument is without merit. State v. Brown, 320 N.C. at 213-14, 358 S.E.2d at 23-24.

(5) He contends that N.C.G.S. § 15A-2000 in its entirety is unconstitutional. The argument is without merit. State v. Brown, 315 N.C. 40, 60-61, 337 S.E.2d 808, 823-24 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988).

Defendant has not persuaded us that we should depart from our prior holdings on these "preservation" issues, and we decline to do so.

We conclude that the sentencing phase of defendant's trial was fair and free of prejudicial error.

PROPORTIONALITY REVIEW

Because we have found no error in the guilt and sentencing phases, we are required to review the record and

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[1] This issue was as follows: "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the impostion of the death penalty when considered with the mitigating circumstance or circumstances found by you?"

[2] This statute establishes, as an aggravating circumstance which the jury may consider, the following: "The defendant had been previously convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3) (1983).

determine: (1) whether the record supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1983); State v. Robbins, 319 U.C. 465, 526, 536 S.E.2d 279, 315 (1987).

The jury found, as aggravating circumstances, that (1) defendant had been convicted previously of a felony involving the use of violence to the person, and (2) the murder was committed against a deputy sheriff while engaged in the performance of his official duties. N.C.G.S. § 15A-2000(e)(3), (8) (1983). As to the first aggravating circumstance, the State presented uncontroverted documentary evidence establishing that defendant previously had pled guilty to second degree murder and been sentenced to imprisonment of not less than twenty-two nor more than twenty-eight years. As to the second aggravating circumstance, the record contains plenary, uncontroverted evidence that the victim was, at the time of the shooting, a deputy sheriff engaged in the performance of his official duties. The record thus fully supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death.

We find nothing in the record which suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

In conducing proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." State v.

Brown, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985). We use the "pool" of similar cases announced in State v. Williams, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). *Id.* However, "[w]e do not find it necessary to extrapolate or analyze *in our opinions* all, or any particular number, of the cases in our proportionality pool." State v. Robbins, 319 N.C. at 529, 356 S.E.2d at 316 (emphasis in original).

The crime here was committed against a law enforcement officer while he was engaged in the performance of his official duties. We have noted that this aggravating circumstance, found in N.C.G.S. § 15A-2000(e)(8) reflects the General Assembly's recognition of the "common concern" that "the collective conscience requires the most severe penalty for those who flout our system of law enforcement." State v. Brown, 320 N.C. at 230, 358 S.E.2d at 33.

> The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.

State v. Hill, 311 N.C. 465, 488, 319 S.E.2d 163, 177 (1984) (Mitchell, J., dissenting).

Defendant argues that State v. Hill, 311 N.C. 465, 319 S.E.2d 163, where a majority of this Court found the death sentence disproportionate, is the case in the pool most comparable to this one. We disagree. The defendant in *Hill* shot and killed a police officer in a struggle

that ensued when the officer tackled the defendant. A significant factor in this Court's holding that the death sentence was disproportionate was "the incredibly short amount of time involved." State v. Hill, 311 N.C. at 479, 319 S.E.2d at 172. *See also* State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983), where an officer entered a store while a robbery was in progress, the defendant's response in shooting him was almost instantaneous, and the jury recommended a life sentence. Here, by contrast, the killing followed a considerable period during which law enforcement officers and a neighbor attempted to persuade defendant to stop the shooting, and during which defendant expressly said to the victim: "You leave or I'll kill you."

Further, unlike in the present case, there is no indication in *Hill* or *Abdullah* that the defendants in those cases had been convicted previously of a felony involving violence against the person. We thus conclude that those cases are not sufficiently comparable to the present case to suggest or require a holding that the death sentence here is disproportionate.

Rather, the more comparable case is State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981). There, "the record clearly establishe[d] a course of conduct on the part of the defendant which amount[ed] to a wanton disregard for the value of human life and for the enforcement of the law by duly appointed authorities." *Id.* at 357, 279 S.E.2d at 810. We concluded that under such circumstances the sentence of death was not disproportionate or excessive, considering both the crime and the defendant. *Id.* at 357-58, 279 S.E.2d at 810.

Here, as in *Hutchins*, on the day of the murder defendant engaged in a course of conduct that showed a wanton disregard for the value of human life. His episodic, random shooting—despite several warnings to stop it—threatened all who inhabited, or ventured into, the

neighborhood. His ultimate violent act, which followed his own warning to the victim to "leave or I'll kill you," struck at the enforcement of the law by duly appointed authorities.

Thus, as in *Hutchins*, we conclude that nothing about the crime renders defendant's sentence of death disproportionate or excessive.

As to the defendant, the jury found—supported by competent, uncontroverted evidence—that he previously had been convicted of a felony involving the use of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1983). As noted, the record establishes that defendant had pled guilty to second degree murder and had been sentenced to imprisonment of not less than twenty-two nor more than twenty-eight years.[3] Defendant's prior offense thus involved the unlawful killing of another human being with malice, *see State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983), and was therefore among the most serious of the many felonies "involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3) (1983).

In State v. Brown, we noted that the aggravating circumstance provided for in N.C.G.S. § 15A-2000(e)(3) "reflect[s] upon the defendant's character as a recidivist." 320 N.C. at 224, 358 S.E.2d at 30. The jury in *Brown* found only the "prior violent felony" aggravating circumstance, *id.* at 219, 358 S.E.2d at 27, whereas the jury here found the additional aggravating circumstance that the offense was committed against a law enforce-

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[3] We take judicial notice of our own records—In re Trucking Co., 285 N.C. 552, 557, 206 S.E.2d 172, 176 (1974); In re Williamson, 61 N.C. App. 184, 185, 312 S.E.2d 239, 240 (1984)—and note that prior to entering his plea of guilty of second degree murder on this charge, defendant had been found guilty of first degree murder and sentenced to death. This Court, however, awarded a new trial for errors in the instructions. *See* State v. McKoy, 236 N.C. 121, 71 S.E.2d 921 (1952).

ment officer while he was engaged in the performance of his duties. N.C.G.S. § 15A-2000(e)(8) (1983). Further, the prior violent felony in *Brown* was the discharge of a shotgun into an occupied building—*id.* at 232, 358 S.E.2d at 34—a considerably less serious offense than second degree murder, the prior violent felony here. We concluded in *Brown* that we could not hold as a matter of law that the death sentence was disproportionate. *Id.* at 231, 358 S.E.2d at 34. *A fortiori*, the more serious nature of the total criminal conduct of the defendant here dictates the same conclusion.

We have carefully considered the circumstances of the offense and the character and propensities of the defendant as revealed by the record, briefs, transcript and arguments. We conclude that the facts of this case, combined with defendant's history, support the jury decision to impose the ultimate penalty of death. We thus hold that the death sentence imposed is not disproportionate within the meaning and intent of N.C.G.S. § 15A-2000 (d)(2). Upon this holding the death sentence is affirmed. "This Court has no discretion in determining whether a death sentence should be vacated. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703; *see* Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 973." State v. Robbins, 319 N.C. at 529, 356 S.E.2d at 317.

NO ERROR.

Chief Justice EXUM dissenting.

I join in the dissenting opinions of Justice Martin and Justice Frye. I also dissent from the majority's position that Mills v. Maryland, 486 U.S. ——, 100 L.Ed. 2d 384 (1988), does not require us to overrule State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled in part on other grounds*, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988); and I write separately in support of my position that *Mills* does require us to overrule *Kirkley* and its progeny.

In *Kirkley* the question arose for the first time in this jurisdiction as to whether a jury in a capital sentencing proceeding must agree unanimously that a mitigating circumstance existed in order to consider that circumstance in the ultimate determination of whether the defendant should live or die. At the sentencing phase of Kirkley's trial the unanimity issue was not addressed in the trial court's initial jury instructions. After some deliberation the jury returned to the courtroom to ask specifically whether it must agree unanimously on each mitigating circumstance before it could continue to consider that circumstance in determining whether to impose death or life imprisonment. The trial court instructed the jury that it must unanimously agree on each mitigating circumstance before it could continue to consider it in the ultimate balancing process. A majority of this Court in *Kirkley* held, contrary to the position of both the defendant and the state, that there was no error in the trial court's supplemental instructions on the unanimity question, saying, "Certainly consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." Kirkley, 308 N.C. at 218, 302 S.E.2d at 157.

Dissenting on this issue in *Kirkley*, I adopted essentially what was then the state's position. The state in its brief in *Kirkley* said:

Lockett v. Ohio, 438 U.S. 586 [57 L.Ed. 2d 973] (1978), holds that a statute that prevents the sentencer in all capital cases from giving independent weight to aspects in mitigation creates a risk that a death penalty will be imposed in spite of factors which call for a less severe penalty and thus is unconstitutional. It would seem manifestly improper, then, not to permit members of a jury to consider a factor in mitigation simply because all members of the jury were not satisfied with the defendant's showing concerning a particular mitigating circumstance. It would also make any sentencing procedure unmanageable if each time a jury deadlocked on an issue a new sentencing hearing was required.

It is the State's position that only those mitigating circumstances found unanimously to exist should be listed on the verdict sheet recommended in State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038 [72 L.Ed. 2d 155] (1982). *However, no juror should be precluded from considering anything in mitigation in the ultimate balancing process even if that mitigating factor was not agreed upon unanimously. To do otherwise, the State believes, could run afoul of Lockett v. Ohio, supra.*

Kirkley, 308 N.C. at 229, 302 S.E.2d at 163 (emphasis supplied). I wrote in my *Kirkley* dissent:

> While the state's position on this question might pass constitutional muster, I think the better practice would be to instruct: (1) unanimity is not required in order to answer the question of the existence of a mitigating circumstance favorably to defendant; (2) such an issue should be answered unfavorably to defendant only if all jurors agreed to so answer it; (3) such an issue should be answered favorably to defendant if any juror would so answer it with an indication on the verdict form as to how many jurors so voted; and (4) in the final balancing process each juror would be free to consider only those mitigating circumstances which he or she were persuaded existed in the case.

Kirkley, 308 N.C. at 229-30, 302 S.E.2d at 163. I still adhere to this position.

Despite the majority's valiant effort to explain *Mills* away, the *Mills* holding cannot be reconciled with our *Kirkley* holding on the unanimity question. Instead the *Mills* holding squarely sustains the position both the state and I took in *Kirkley* on this issue. Whatever escape from the *Mills* holding might be provided by differences in Maryland's and North Carolina's capital sentencing scheme or by the posture in which the *Mills* case reached the Supreme Court is effectively closed, it seems to me, by the rationale of the *Mills* decision as expressed in the opinion itself.

The majority correctly identifies the *Mills* holding: Jury instructions in a capital sentencing proceeding which create "a substantial probability that reasonable jurors . . . may well have thought that they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance" are constitutionally infirm under the Supreme Court's Eighth Amendment jurisprudence. Mills, 486 U.S. at ——, 100 L.Ed. 2d at 400. Our *Kirkley* holding is precisely to the contrary and should, therefore, yield

The majority chooses instead to distinguish *Mills* on the basis of two circumstances urged upon this Court by the state as legally material differences.

The first difference suggested is that in Maryland a capital sentencing jury which finds at least one aggravating circumstance and fails to find any mitigating circumstances never engages in a balancing process and

must return a sentence of death. In North Carolina even if one or more aggravating circumstances and no mitigating circumstances are found, the jury may nevertheless elect not to impose the death penalty on the basis that the aggravating circumstances are themselves not sufficiently substantial to call for its imposition.

Relying on this difference in the two states' sentencing schemes as justification for continuing our *Kirkley* unanimity requirement ignores the rationale underlying the *Mills*' holding as it is explained in the *Mills* opinion. It is true that the Supreme Court in *Mills* was concerned that a single holdout juror in Maryland on mitigating circumstances might force the imposition of the death penalty. The last substantive sentence of the *Mills* opinion is, "[t]he possibility that a single juror could block [consideration of mitigating evidence], and consequently require the jury to impose the death penalty, is one we dare not risk." Mills, 486 U.S. at ——, 100 L.Ed. 2d at 400. Indeed in *Mills* the jury found the one aggravating circumstance submitted, found none of the several mitigating circumstances submitted and on that basis returned a sentence of death.

In Maryland, however, a jury finding one or more aggravating circumstances to exist and one or more mitigating circumstances to exist would then balance the conflicting sets of circumstances by determining whether the mitigating circumstances outweigh the aggravating. In this situation the Maryland sentencing scheme is indistinguishable in principle from North Carolina's.

In North Carolina when both mitigating and aggravating circumstances are found the jury must determine whether the mitigating circumstances are insufficient to outweigh the aggravating. If they are insufficient, then the aggravating circumstances must be considered with the mitigating circumstances and found to be sufficiently substantial to warrant imposition of the death penalty.

In both balancing processes only those mitigating circumstances found to exist by all twelve jurors can be considered. Eleven jurors are prevented from considering mitigating circumstances they might wish to consider in these final balancing processes if the one remaining juror refuses to do so. This amounts to contradicting *Mills* by unconstitutionally precluding jurors in North Carolina from considering mitigating circumstances when they ultimately determine whether to impose the death penalty.

The *Mills* rationale as expressed in the opinion leads inescapably to the conclusion that its holding would apply to a Maryland case whether the jury found no mitigating circumstance or at least one but not all the mitigating circumstances submitted to it. Since in this situation Maryland's capital sentencing scheme is no different from North Carolina's, it must follow that the *Mills* holding applies equally to North Carolina's capital sentencing scheme.

The Eighth Amendment jurisprudence upon which *Mills* rests is that in a capital case the sentencing authority may not be precluded from considering any relevant mitigating circumstance which might be proffered by the defendant as reasonably justifying a sentence other than death. Skipper v. South Carolina, 476 U.S. 1, 4, 90 L.Ed. 2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110, 71 L.Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 57 L.Ed. 2d 973 (1978). This jurisprudence is summarized at the outset of the substantive discussion in *Mills*. Mills, 486 U.S. at ——, 100 L.Ed. 2d at 393-94. Later in its opinion the Supreme Court posits a Maryland capital sentencing process under which the jury actually reaches the balancing stage, saying:

> Ordinarily, a Maryland jury reaches the balancing stage of the deliberation process any time it unanimously finds at least one mitigating circumstance, or, under the interpretation adopted by the Court of

> Appeals in this case, any time the jury does not unanimously reject all mitigating circumstances. Had the jurors that sentenced petitioner reached Section III, they would have found that even if they had read the verdict form as the Court of Appeals suggests they could have, and marked "yes" or "no" only on the basis of unanimity as to either, they were not free at this point to consider *all* relevant evidence in mitigation as they balanced aggravating and mitigating circumstances. Section III instructed the jury to weigh only those mitigating circumstances marked "yes" in Section II. Any mitigating circumstance not so marked, even if not unanimously rejected, could not be considered by any juror. A jury following the instructions set out in the verdict form could be "precluded from considering, *as a mitigating factor*, [an] aspect of a defendant's character or record [or] a circumstanc[e] of the offense that the defendant proffer[ed] as a basis for a sentence less than death." Skipper v. South Carolina, 476 U.S. at 4, 90 L.Ed. 2d 1, 106 S.Ct. 1669, if even a single juror adhered to the view that such a factor should not be so considered.

Mills, 486 U.S. at ——, 100 L.Ed. 2d at 397 (footnote omitted). Footnote 14 presses the point further:

> For example, some jurors in this case might have found that petitioner's age, 20, constituted a mitigating factor, i.e., youthfulness, under § 413(g)(5). Indeed, in his sentencing report the trial judge noted: "There was evidence from which the jury could have found the existence of Mitigating Circumstance No. 5 (youthful age)." App. 108. Other jurors, on the other hand, might have accepted the prosecutor's argument that petitioner was "not youthful in terms of the criminal justice system," id., at 79, because of his history of criminal activity. Under such circumstances, the lack of unanimity would have prevented the jury from marking that answer "yes." Regardless of whether the answer was marked "no" or left blank, the instructions in Section III would prevent those jurors who thought petitioner's youthfulness was relevant to the ultimate sentencing decision from giving that mitigating circumstance any weight.

Mills, 486 U.S. at ——, 100 L.Ed. 2d at 397-98 n.14.

The majority next attempts to distinguish *Mills* on the basis of the posture in which that case reached the Supreme Court. The majority notes that the Maryland Court of Appeals in its *Mills* opinion and the State of Maryland before the United States Supreme Court both conceded that mitigating evidence continued to be legally relevant even if the jury does not unanimously find it to have mitigating value; but in North Carolina such evidence ceases to be legally relevant if rejected by even one juror.

This argument stands *Mills* and the Eighth Amendment jurisprudence upon which it rests on their respective heads. The jurisprudence so far developed by the Supreme Court in a series of cases to which I have already referred is that the Eighth and Fourteenth Amendments preclude a state from creating barriers to the consideration by a capital sentencer of all evidence which may reasonably be said to have mitigating value. It makes no difference what form these barriers take. The Supreme Court said unequivocally in *Mills*:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, Lockett v. Ohio, supra; Hitchcock v. Dugger, 481 U.S. ——, 95 L.Ed. 2d 347, 107 S.Ct. 1821 (1987); by the sentencing court, Eddings v. Oklahoma, supra; or by an evidentiary ruling, Skipper v. South Carolina, supra. *The same must be true with respect to a single*

> *juror's holdout vote against finding the presence of a mitigating circumstance.* Whatever the cause, . . . the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing." Eddings v. Oklahoma, 455 U.S. at 117, n°, 71 L.Ed. 2d 1, 102 S.Ct. 869 (O'Connor, J., concurring).

Mills, 486 U.S. at ——, 100 L.Ed. 2d at 394 (emphasis supplied).

"[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" New Jersey v. T.L.O., 469 U.S. 325, 345, 83 L.Ed. 2d 720, 737 (1985), quoting Fed. R. Evid. 401. As noted by Thayer, "The law furnishes no test of relevancy." E. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 265 (1898). The concept of logical relevancy employed in Rule 401 must be kept separate from issues of sufficiency of evidence for any purpose such as to satisfy a burden of production. M. Graham, *Handbook of Federal Evidence* § 401.1 (2d ed. 1986). This concept of relevancy is the same in the context of mitigating evidence in a capital sentencing proceeding as it is in other contexts. Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact of

the truth of the proposition for which it is offered. *Id.* at § 401.1 n12.

To say, as the majority here does, that jury unanimity on a mitigating factor is necessary to make that factor legally relevant in the final balancing process seems not only to be a misuse of the concept of relevancy but also a classical case of circular reasoning with regard to the constitutional question presented. When the Supreme Court speaks in *Mills* of the constitutional necessity for permitting the sentencer in a capital case to "consider" all mitigating evidence in determining whether to impose or not to impose the death penalty, it clearly has reference to that stage of the process where the final sentencing decision is being made. It is at that stage where under *Mills* and its predecessors any juror must not be precluded from considering evidence that juror might reasonably believe to have mitigating value. It is not enough that the juror be permitted to "consider" the mitigating evidence at the point when the jury is trying to determine whether any particular mitigating circumstances exist. There is no question that all jurors were permitted to consider such evidence at that stage of the process in *Mills*.

Rather, the question presented in *Mills* is whether at the ultimate decision-making stage of a capital sentencing proceeding it is constitutionally permissible to preclude any juror from considering a mitigating circumstance that juror believes to exist because not all jurors agree on its existence. *Mills* answers that question "no." It also makes clear that the question must be answered "no" notwithstanding any procedural devices a state may employ to preclude the sentencer's consideration of mitigating factors at the ultimate decision-making stage. This means to me that North Carolina cannot preclude jurors from considering mitigating evidence at that stage by labeling the evidence legally irrelevant.

The majority relies in part on Franklin v. Lynaugh, —— U.S. ——, 101 L.Ed. 2d 155 (1988), for the proposition that it is permissible for states to structure, direct and focus the jury's consideration of mitigating evidence. Guiding and structuring the jury's consideration of mitigating evidence is one thing; precluding the jury's consideration of such evidence at the final decision-making stage is quite another. *Lynaugh* permits the former; *Mills* prohibits the latter. Indeed, the Supreme Court concluded the instructions in *Lynaugh* were not constitutionally infirm "[b]ecause we do not believe that the jury instructions or the Texas Special Issues precluded jury consideration of any relevant mitigating circumstances in this case, or otherwise unconstitutionally limited the jury's discretion . . . ." Lynaugh, —— U.S. at ——, 101 L.Ed. 2d at 171.

Because the majority's reliance on the Supreme Court's denial of certiorari in two North Carolina cases in which the *Mills* issue was raised is sparing and properly carries with it the recognition that such denials mean nothing with regard to the Court's views on the merits of the case, I see little need to respond to this aspect of the majority's opinion. Suffice it to say that, according to the authorities cited by the majority, the Supreme Court's position on the issue of the unanimity requirement vis-a-vis mitigating circumstances in a capital sentencing procedure should be determined entirely from its holding and its analysis in *Mills* and not at all from its denials of applications for writs of certiorari in cases in which this issue might have been raised.

Justice Frye joins in this dissenting opinion.

Justice Frye, dissenting.

Believing that the defendant has not received a fair and impartial trial, I dissent from the majority's decision in both the guilt-innocence and sentencing phases of the trial. First, I am convinced that under the totality of the circumstances, defendant's oral confession was not knowingly and voluntarily made and, for that reason, its admission in evidence against him was error. These circumstances are set out in some detail in the dissenting opinion of Justice Martin in which he concludes that the defendant is entitled to a new trial. I concur in that portion of his opinion.

I also conclude that the defendant is entitled to a new sentencing hearing as stated in the dissenting opinion of the Chief Justice for the reasons stated in his dissenting opinion.

I write separately because I disagree with the majority's treatment of two other issues which bear directly upon the guilt-innocence phase of the trial and indirectly, if not directly, upon the jury's determination of whether the defendant should receive life imprisonment or the death penalty. My first difference with the majority relates to its treatment of the fact that both the trial court and the prosecutor informed the jury that the trial was subject to appellate review.

Defendant argued that the fact that both the trial court and the district attorney informed the jury that defendant's trial was subject to appellate review constitutes reversible error; that conveying that information to the jury fatally undermined the reliability of the jury's determination that defendant was guilty of murder in the first degree and the jury's conclusion that death was the appropriate punishment. The majority responds by reviewing this Court's decisions in State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975), and State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979), and the

United States Supreme Court's decision in Caldwell v. Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231 (1985), concluding that those cases

> stand for the proposition that statements by the trial court or prosecutor that tend to dilute the jury's sense of responsibility for its determinations by suggesting that its verdict will be reviewed, or that the punishment imposed will be withheld, are impermissible and prejudicial. *See* 75 Am. Jur. 2d *Trial* § 230 (1974) ('[c]omments . . . on the power of the court to suspend sentence or to set the jury's verdict aside, or statements that a higher court has the power to review the finding of the jury on the weight of the evidence, are calculated to induce the jury to disregard their responsibility, and are improper.').

The majority then proceeds to distinguish the above cases from the instant case. I find those cases controlling. In *White*, the prosecutor told the jury that "[if] any error is made in this court, [the Supreme] Court will say." White, 286 N.C. at 402, 211 S.E.2d at 449. Here, the prosecutor argued, "[t]here is a right of appeal to any interpretation of laws and application of laws which are present in this case."

Further, in *White* the court stated to the jury that "the Supreme Court will review this case." *Id.* at 402, 211 S.E.2d at 449. This Court concluded that by that "positive statement . . . the jury was bound to have understood that the court assumed [that] their verdict would be guilty." *Id.* at 404, 211 S.E.2d at 450-51. Here, the judge told the jurors that the court reporter

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The majority draws a distinction between the use of the words "will review" in *White* and "can review" in the instant case. The distinction, in context, is too fine. As this Court made clear in *White*, a jury in a capital case must weigh the evidence and find the facts on the assumption that whatever verdict they render will be the final disposition of the case. When the judge tells the jurors that the court reporter is taking everything down so that it is a matter of public record, that it will be mailed down to the Supreme Court so that the Supreme Court can review "what we're doing up here in Stanly County," reasonable jurors could easily believe, as stated by this Court, in State v. Jones, 296 N.C. 495, 500, 251 S.E.2d 425, 428, "that the Supreme Court would share with them a burden and responsibility which was in fact their sole responsibility." This belief is further encouraged when the court overrules defendant's objection to the prosecutor's argument that if convicted defendant can appeal on points of law. As Chief Justice Sharp intimated in *White*, jurors may not fully comprehend "the nature of the Supreme Court's review of a case upon appeal and . . . the difference between 'triers of the facts' and judges of the law." White, 286 N.C. at 404, 211 S.E.2d at 450. Here, the trial judge both directly told the jury that its verdict was subject to appellate review and, subsequently, sanctioned the States' comments on that subject by overruling defendant's timely objection. Given those facts and the prior holdings of this Court, defendant's conviction and sentence of death should be vacated and this case remanded for a new trial.

I also disagree with the majority's treatment of defendant's contention that the trial court erred by allowing the prosecutor, during voir dire, to "stake out" the jurors by obtaining commitments from them to disregard defendant's intoxication in determining the existence of premeditation and deliberation and to reject his voluntary intoxication defense. The purpose of voir dire ex-

amination of prospective jurors is to secure an impartial jury. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978). To assure that end, this Court has repeatedly held it improper for counsel to "stake out" jurors during voir dire by posing hypothetical questions designed to elicit in advance what a juror's decision will be under a certain state of evidence or upon a given state of facts. *See e.g.*, State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986); State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985); State v. Vinson, 287 N.C. 382, 307 S.E.2d 139 (1983); State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1981).

The prosecutor asked the prospective jurors "if it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you in your opinion to have sympathy for him and allow that sympathy to affect your verdict?" The jurors assured the prosecutor that they would not let that fact influence their decision. Further, at the sentencing stage, the prosecutor stated "he was drinking liquor and I told you before you were chosen as a juror that if it is shown that he's intoxicated, were you going to have sympathy, sympathetic to his cause. As I recall, you said you wouldn't."

Allowing the prosecutor to seek and obtain commitments from the jurors was tantamount to asking them to ignore evidence of intoxication in reaching their verdict and in determining the appropriate sentence. The evidence of defendant's intoxication was overwhelming. Deputy Sheriff Lambert went to defendant's home in response to a report that defendant was drunk and firing a shotgun. Deputy Lambert testified that defendant would mumble but he could not understand him and that defendant, though standing, was "wobbly." The emergency room physician testified that defendant had a strong odor of alcohol, did not respond coherently to the doctor's questions, and, notwithstanding a laceration to

his skull and a wound to his left buttocks, did not complain of any pain and was not given any medication for pain. Defendant had a blood alcohol level of .264 shortly after the shooting. Dr. Robert Rollins, clinical director of the Dorothea Dix forensic psychiatry unit, included among defendant's diagnoses: "episodic alcohol abuse," "alcohol intoxication, recovered," and "organic delusional syndrome." In Dr. Rollins' professional opinion, defendant could not distinguish between right and wrong at the time of the offense and could not have formed the specific intent to kill the officer. In the opinion of Dr. Patricio Lara, another Dorothea Dix Hospital psychiatrist who also examined defendant, his intoxication, together with his limited intellectual functioning and personality disorder, resulted in an impairment of his ability, at the time of the offense, to conform his conduct with the requirements of the law.

Intoxication, even when voluntary, may constitute a valid defense to the charge of murder in the first degree. *See, e.g.*, State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983) (if defendant was intoxicated to a degree precluding premeditation and deliberation, he cannot be found guilty of murder in the first degree); State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978) (defendant cannot be convicted of murder in the first degree if intoxicated to a degree sufficient to preclude forming a specific intent to kill).

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As stated by the Supreme Court of Mississippi in Stringer v. State, 500 So.2d 929 (1986):

> It is improper influence to put the jury in a 'box' by *voir dire* tactics which extract a promise, prior to trial, to ignore evidence favorable to the defendant. This promise or pledge prevents the jurors from considering all facts relevant to the verdict. The jurors are then called upon during closing arguments to fulfill that promise, and the effect—whether calculated or not—is to shame or coerce the jury into rejecting factors which would tend to mitigate against the death penalty.

Id., 500 So.2d at 936-37.

For all of the reasons indicated herein, and for the reasons set forth in the dissenting opinion of Justice Martin, defendant should be given a new trial. Even if his conviction is upheld, he should be given a new sentencing hearing for the reasons stated in the dissenting opinion of the Chief Justice.

PROPORTIONALITY

Because I do not believe that defendant has received a fair trial free of prejudicial error, I would not reach the question of proportionality. However, since the majority reaches that question and finds that the death sentence is not disproportionate in this case, I write to express my disagreement with that conclusion also.

As the majority correctly states, in conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." State v. Brown, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985). There are four cases in the proportionality pool in which defendants killed law enforcement officers engaged in the performance of their official duties. Those cases are: State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985), State v. Hill, 311 N.C. 465,

319 S.E.2d 163 (1984); State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983), and State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

In *Payne*, defendant murdered a detective who had earlier arrested him on a drug charge. He handcuffed the detective's hands behind his back and pushed him into a river to drown. The jury returned a verdict of life imprisonment. In *Hill*, a policeman chased and tackled the defendant who was suspected of having committed a felony. During the ensuing struggle, defendant managed to get possession of the officer's pistol and shot and killed him. This Court found the death sentence disproportionate and sentenced defendant to life imprisonment. In *Abdullah*, defendant conspired with others to commit an armed robbery and shot the policeman several times during the course of the robbery, killing him. The jury returned a verdict of life imprisonment. In *Hutchins*, the defendant shot and killed two officers and then shot and killed a third officer who was attempting to arrest him. This Court upheld the sentence of death.

When considering the crime and the defendant and comparing this case with the crime and the defendants in the other four cases involving the killing of law enforcement officers, I find the instant case more like *Abdullah*, *Hill*, and *Payne* than *Hutchins*. Thus I agree with defendant that to conclude that he deserves to die, when the defendants in *Abdullah*, *Payne*, and *Hill* were spared that ultimate penalty, would defeat the purpose of proportionality review mandated by the legislature, which, as this Court stated in State v. Jackson, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983), "is to serve as a check against the capricious or random imposition of the death penalty." Thus, were I to reach proportionality, I would find the death sentence in the instant case disproportionate as a matter of law and sentence defendant to life imprisonment.

Chief Justice Exum joins in this dissenting opinion.

Justice Martin dissenting in part.

I respectfully dissent from the holding of the majority that defendant's inculpatory statements were admissible; otherwise, I concur in the majority opinion, including specifically, the resolution of the issue arising under Mills v. Maryland, 486 U.S. ——, 100 L. Ed. 2d 384 (1988).

With respect to the confession issue, the majority approves the admission of inculpatory statements by a sixty-five-year-old black man with an I.Q. of 74, blind in one eye, his other eye injured and bandaged so that he could not see, wounded and treated at the hospital, with a blood alcohol level of .264, afraid for his life, travelling in a van with officers for over two hours from Anson County to Raleigh, at times cold and thirsty, suffering from his wounds, and being, in the opinion of Dr. Rollins, incapable of appreciating the waiver of his constitutional rights. In this I cannot concur.

Perhaps by finecombing the record, as the majority has done, some evidence can be found which when isolated may support some of the trial court's findings of fact. The true test of the voluntariness of a confession, though, is found in the totality of the circumstances. State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983). Once it is established that the procedural requirements of Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), have been met, the determination of whether defendant's confession was knowingly and voluntarily made must be found from considering all of the circumstances of the case. State v. Corley, 310 N.C. 40, 311 S.E.2d 540 (1984).

What were the totality of the circumstances when defendant confessed?

THE ENVIRONMENT

First, it is to be noted that defendant was in a sheriff's van, being transported to Raleigh "for safekeeping" without the issuance of a judicial order authorizing the transfer. N.C.G.S. § 15A-521 (1983). Although an officer testified that "warrants" were served on defendant while in the van, no warrants appear in the record on appeal. The crime occurred and defendant was taken to Raleigh on 22 December 1984. The order of arrest in the record on appeal was served on defendant on 24 January 1985. So we have a defendant being unlawfully transported in a van through the black of night by hostile officers, alone, with no way to contact anyone outside the van as a witness or otherwise.

The trial court failed to consider the actions of the officers in removing defendant from the hospital and interrogating him in the isolated and coercive environment of a moving police van. Compelling a suspect to travel during interrogation, or interrogating a suspect during travel, is a factor which suggests involuntariness. Clewis v. Texas, 386 U.S. 707, 18 L. Ed. 2d 423 (1967). Here, the defendant was completely incommunicado and isolated from the police station or the jail. This was obviously done for the purpose of interrogating the defendant in an environment conducive to producing inculpatory statements. These are factors indicating involuntariness. This is particularly true when the defendant is susceptible to coercion. Vernon v. Alabama, 313 U.S. 547, 85 L. Ed. 1513 (1941) (per curiam); White v. Texas, 310 U.S. 530, 84 L. Ed. 1342 (1940). The officers were fully aware that the defendant had been badly wounded by gunfire shortly before the interrogation. They knew that defendant had been extremely intoxicated when he was brought to the hospital. They knew he was blind and in a severely weakened physical condition. Having this knowledge, the officers took the defendant from the hospital on a gurney, placed him into a police van con-

taining three officers, and commenced the nighttime ride from Wadesboro to Raleigh. In so doing, the officers deliberately cut defendant off from the outside world, leaving him in a position of extreme vulnerability to their interrogation. It is difficult to conceive of a fact situation more conducive to overbearing a defendant's will than the one existing in this case.

THE DEFENDANT

The defendant at the time of this offense was sixty-five years of age. He was suffering from serious gunshot wounds sustained in the preceding hours. He was blind, mentally disordered, had a borderline intellect, and was under the influence of alcohol. He expressed to the officers that he was afraid for his life at the time they were interrogating him in the police van. Dr. Perry, an emergency room physician, testified that defendant was brought to the hospital by ambulance around 6:30 p.m. Dr. Perry treated him in the trauma facility for two serious gunshot wounds, one a laceration through the forehead down to the skull, the other a puncture wound to the buttocks. The head wound was about six centimeters long and very deep, the bullet passing through the entire thickness of the forehead down to the skull. The wound to the buttocks was a through-and-through injury, about ten to twelve centimeters in length. Defendant was semiconscious at the time of his arrival and unable to respond coherently to the doctor's attempts to communicate with him. Such wounds are normally very painful, but defendant did not indicate that he was suffering the normal degree of pain, which the doctor attributed to the degree of defendant's alcoholic intoxication, which was a blood alcohol level of .264. Dr. Perry treated defendant's wounds for some forty minutes, closing them with sutures. They were heavily bandaged, completely closing the defendant's good eye, he being blind in the other eye. During the treatment defendant was administered intravenous fluids for the purpose of elevating his blood pressure, according to Dr. Perry.

Dr. Rollins is an expert medical witness, a forensic psychiatrist, and employed by the state. He examined the defendant several times with respect to this incident. He testified that defendant had multiple personality disorders, including paranoid and delusional thinking, with impaired judgment and perception. In 1980 he had scored 89 on an I.Q. examination, but later, at the time of this event, his I.Q. test score had deteriorated to 74, which placed defendant in the borderline range of intellectual functioning. Dr. Rollins further testified that defendant was substantially intoxicated at the time of the interrogation and that this condition would exacerabate defendant's mental disabilities. He expressly testified that defendant, because of his mental disorders and his physical condition at the time, was incapable of knowingly and voluntarily waiving his constitutional rights at the time that he was interrogated by the officers.

The trial judge failed to make any findings as to the defendant's mental condition and completely overlooked the deteriorating mental and psychotic condition of the defendant which had occurred over the past five years as evidenced by the decline in his I.Q. scores. The court's determination that defendant had an I.Q. at the time of the interrogation between 74 and 89 is unsupported by the evidence. The only relevant evidence indicates that at the time of the interrogation defendant's I.Q. was 74, having deteriorated from the 89 that he had scored some five years previously. Mental handicaps which make a defendant particularly susceptible to the influence of others are an important factor in weighing voluntariness. Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979). Further, a defendant's physical condition is an important factor in determining whether a confession is voluntary. Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972). *See also* State v. Dailey, 351 S.E.2d 431 (W. Va. 1986).

In Colorado v. Connelly, 479 U.S. ——, 93 L. Ed. 2d 473 (1986), the United States Supreme Court held that ordinarily a defendant's mental impairment, standing alone, is not a sufficient basis for ruling a confession involuntary. However, in this case, we have not only the defective mental condition of the defendant, but also the coercive environment in which the officers placed the defendant, together with his impaired physical condition. These factors considered together are sufficient to show involuntariness.

THE INTERROGATION

After placing the defendant in the police van and beginning the journey to Raleigh, the officers informed the defendant of his rights as they were leaving the Wadesboro city limits. To this the defendant responded: "I was tried for my life and I understand all this stuff. I was tried for my life back in 1951." Interestingly, *Miranda* warnings were not required until 1966, fifteen years *after* defendant's earlier court experience. The officers testified that after being read his rights defendant said "[h]e did understand but he did not want to sign anything because he couldn't see." From this testimony, the trial court found that the defendant made an "express" statement that he did not want an attorney present. A fair reading of this testimony, however, only shows that the defendant responded that he understood his rights, but he did not want to sign anything because he could not see. There is no indication in this testimony that the defendant expressly waived the presence of counsel. He did not go the additional step and say: "I don't want a lawyer now." Of course, it is not essential that there be an express waiver by defendant. However, the court must presume that the defendant did not waive his rights. State v. Connley, 297 N.C. 584, 256 S.E.2d 234, *cert. denied*, 444 U.S. 954, 62 L. Ed. 2d 327 (1979). The trial court's findings of an express waiver is unsupported by the evidence. Nowhere does the trial court find an implied waiver under all the circumstances of the case, and none can be so found. For this reason, I think that the trial judge's order is fatally flawed.

The interrogation continued for some two hours, and during this time the officers obtained admissions from defendant that proved to be critical to the state's case. During the interrogation, the defendant stated, "I'm fearing for my life now." Although the officers testified that they assured defendant that he had nothing to fear, the defendant could not see the officers and had no way of knowing what they were doing in the van. He also had no way of knowing where they were taking him, even though one officer said he was being taken to Raleigh for safekeeping. Certainly, in view of the environment in which he was situated and his physical and mental condition, it is reasonable that the defendant was fearful for his life at the time that he was being interrogated. That fact alone is sufficient to refute any finding of voluntariness.

During the interrogation the defendant was suffering from his painful bullet wounds. There is no evidence that he had been given any sedatives or pain-killers to alleviate his suffering. The record shows that defendant voiced numerous complaints during the interrogation and that he was experiencing physical discomfort.

At one point defendant told the officers that he was tired and wanted to stop the interrogation. He also complained at that time that he was cold, and the heat in the van was turned up and he was given a sheet to cover himself. After a short period, one of the officers asked defendant if he wanted to talk. Defendant stated that he did not want to talk to Officer Jackson. One of the other officers asked defendant if he would talk with him, and defendant agreed. This procedure by the officers violates the ruling of Edwards v. Arizona, 451 U.S. 477, 68 L. Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L. Ed. 2d 984 (1981). In *Edwards*, the Court held that when a

suspect indicates his desire to stop the interrogation, the officers must terminate it and the interrogation cannot be resumed until initiated by the suspect. Here, the evidence clearly shows that defendant desired to terminate the interrogation. He said that he was tired and wanted to stop. The officers stopped for a short time and then, without any initiation of the interrogation by the defendant, the officers resumed the process of examining the defendant. For this reason, the confession was not admissible.

Thus, I find defendant's statement to be involuntary and the result of his being unlawfully placed in a coercive environment while severely handicapped, both mentally and physically, and interrogated in violation of *Edwards v. Arizona* while fearful for his life. Defendant is entitled to a new trial.

Chief Justice Exum and Justice Frye join in this dissenting opinion.

Justice Frye, dissenting.

Believing that the defendant has not received a fair and impartial trial, I dissent from the majority's decision in both the guilt-innocence and sentencing phases of the trial. First, I am convinced that under the totality of the circumstances, defendant's oral confession was not knowingly and voluntarily made and, for that reason, its admission in evidence against him was error. These circumstances are set out in some detail in the dissenting opinion of Justice Martin in which he concludes that the defendant is entitled to a new trial. I concur in that portion of his opinion.

I also conclude that the defendant is entitled to a new sentencing hearing as stated in the dissenting opinion of the Chief Justice for the reasons stated in his dissenting opinion.

I write separately because I disagree with the majority's treatment of two other issues which bear directly upon the guilt-innocence phase of the trial and indirectly, if not directly, upon the jury's determination of whether the defendant should receive life imprisonment or the death penalty. My first difference with the majority relates to its treatment of the fact that both the trial court and the prosecutor informed the jury that the trial was subject to appellate review.

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I also disagree with the majority's treatment of defendant's contention that the trial court erred by allowing the prosecutor, during voir dire, to "stake out" the jurors by obtaining commitments from them to disregard defendant's intoxication in determining the existence of premeditation and deliberation and to reject his volun-

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shot was fired infringed upon his fundamental right to be tried by an impartial jury.

As stated by the Supreme Court of Mississippi in Stringer v. State, 500 So.2d 929 (1986).

> It is improper influence to put the jury in a 'box' by *voir dire* tactics which extract a promise, prior to trial, to ignore evidence favorable to the defendant. This promise or pledge prevents the jurors from considering all facts relevant to the verdict. The jurors are then called upon during closing arguments to fulfill that promise, and the effect—whether calculated or not—is to shame or coerce the jury into rejecting factors which would tend to mitigate against the death penalty.

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As the majority correctly states, in conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." State v. Brown, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985). There are four cases in

the proportionality pool in which defendants killed law enforcement officers engaged in the performance of their official duties. Those cases are: State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985), State v. Hill, 311 N.C. 465, 319 S.E.2d 163 (1984); State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983), and State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

In *Payne*, defendant murdered a detective who had earlier arrested him on a drug charge. He handcuffed the detective's hands behind his back and pushed him into a river to drown. The jury returned a verdict of life imprisonment. In *Hill*, a policeman chased and tackled the defendant who was suspected of having committed a felony. During the ensuing struggle, defendant managed to get possession of the officer's pistol and shot and killed him. This Court found the death sentence disproportionate and sentenced defendant to life imprisonment. In *Abdullah*, defendant conspired with others to commit an armed robbery and shot the policeman several times during the course of the robbery, killing him. The jury returned a verdict of life imprisonment. In *Hutchins*, the defendant shot and killed two officers and then shot and killed a third officer who was attempting to arrest him. This Court upheld the sentence of death.

When considering the crime and the defendant and comparing this case with the crime and the defendants in the other four cases involving the killing of law enforcement officers, I find the instant case more like *Abdullah*, *Hill*, and *Payne* than *Hutchins*. Thus I agree with defendant that to conclude that he deserves to die, when the defendants in *Abdullah*, *Payne*, and *Hill* were spared that ultimate penalty, would defeat the purpose of proportionality review mandated by the legislature, which, as this Court stated in State v. Jackson, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983), "is to serve as a

check against the capricious or random imposition of the death penalty." Thus, were I to reach proportionality, I would find the death sentence in the instant case disproportionate as a matter of law and sentence defendant to life imprisonment.

Chief Justice Exum joins in this dissenting opinion.

DEATH CASE

SUPREME COURT OF NORTH CAROLINA

STANLY COUNTY

1988

No. 585A85

STATE OF NORTH CAROLINA

vs.

DOCK MCKOY, JR.
a/k/a DOCK MCCOY a/k/a DOCK MCKAY
a/k/a PAUL MCCOY

JUDGMENT

This cause came on to be argued upon the transcript of the record from the Superior Court Stanly County:

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable WILLIS P. WHICHARD, Associate Justice, be certified to the said Superior Court, to the intent that PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION. And it is considered and adjudged further, that the Defendant Do Pay the costs of the appeal in this Court incurred, to wit, the sum of • • • • THREE-

HUNDRED EIGHTY-ONE AND 00/100 * * * * dollars ($381.00), and execution issue therefor, Certified to Superior Court this 27th day of September 1988.

A TRUE COPY

By: J. GREGORY WALLACE
Clerk of the Supreme Court
Assistant Clerk

SUPREME COURT OF THE UNITED STATES

No. 88-5909

DOCK MCKOY, JR.,
Petitioner

v.

NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 21, 1989

FILED
APR 26
JOSEPH F. SPANIOL
CLERK

No. 88-5909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOCK MCKOY, JR.,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of North Carolina

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QUESTION PRESENTED

I. Did the trial judge's capital sentencing instructions, which explicitly informed the jurors that they could not consider mitigating evidence unless it was unanimously found to support a mitigating circumstance, violate this Court's holding in *Mills* v. *Maryland*, 486 U.S. ___ (1988)?

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OPINION BELOW

The opinion of the North Carolina Supreme Court is officially reported at 323 N.C. 1, 372 S.E.2d 12 (1988), and appears in the Joint Appendix (hereinafter cited as "J.A.") at 27-112.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982). The judgment of the Supreme Court of North Carolina affirming Petitioner's conviction and sentence was entered on September 27, 1988. A petition for writ of certiorari was docketed in this Court on November 17, 1988, and was granted on February 21, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment, Constitution Of The United States.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, Constitution Of The United States.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statutes § 15A-2000 (1983)

North Carolina General Statutes § 15A-2000, Capital Punishment, is set forth in the Appendix to this Brief at App. 1-App. 4.

STATEMENT OF THE CASE

A. The Challenged Instructions

The sentencing jury at Dock McKoy's capital trial received oral and written instructions before retiring to decide McKoy's punishment. Both sets of instructions informed the jury how it was to proceed in its deliberations. An "Issues and Recommendations as to Punishment Form" (hereinafter "verdict form") was provided to the jury in writing.[1] Consistent with the trial judge's oral instructions,[2] the verdict form directed the jury to answer four questions. It explained to the jury how to go about answering those questions and how the jury must use the answers to determine life or death.(J.A. 5-6)

In Issue One, the jury was instructed to determine whether any aggravating circumstances were present. In order to find the existence of an aggravating circumstance the jurors were told that they must unanimously agree that the State had proved the existence of the circumstance beyond a reasonable doubt. (J.A. 8, 23) The court submitted the following two aggravating factors, which were provided by statute:

1. That Dock McKoy had been previously convicted of a felony involving the use of violence to the person.[3]

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[1] A copy of the verdict form is in the Joint Appendix. (J.A. 23-26)

[2] The trial court's oral instructions to the jury are included in the Joint Appendix. (J.A. 4-22)

[3] N.C. Gen. Stat. § 15A-2000(e)(3) (1983). (App. 4a).

2. That the murder was committed against a deputy sheriff while engaged in the performance of his official duties.[4]

(J.A. 6-8, 23-24) The jury found both of these aggravating circumstances. Consequently, the jury marked "yes" in answer to the first question on the verdict form, and, as it was instructed to do, moved on to answer the second question. (J.A. 24)

In Issue Two the jury was instructed to find whether any mitigating circumstances existed. The jury was specifically instructed, both in writing on the verdict form and orally, that it must answer "no" to any mitigating circumstances upon which the jurors were unable to reach unanimous agreement. (J.A. 8-13, 24-25) The verdict form gave the jury the following instructions as to the second issue:

ISSUE TWO:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER:____

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. *WRITE "NO," IF YOU DO NOT UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE.*

---

[4] N.C. Gen. Stat. § 15A-2000(e)(8) (1983). (App. 5a).

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE "YES," IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE "NO", IN ALL OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE "NO," IN THE SPACE AFTER ISSUE TWO.

(J.A. 24) (emphasis added).

The court submitted to the jury three statutory and five non-statutory mitigating circumstances. (J.A. 9-13, 25) The jury unanimously found the statutory mitigating circumstance that "the capacity of Dock McCoy [sic] to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired,"[5] and the non-statutory mitigating circumstance that "Dock McKoy has borderline intellectual functioning with a [sic] I.Q. test score of 74." (J.A. 25) The jury failed to find unanimously the statutory mitigating circumstances that:

1. The murder was committed while Dock McKoy was under the influence of mental or emotional disturbance;[6] and,

2. The age of Dock McKoy at the time of this murder [i.e., 65] is a mitigating circumstance.[7]

(J.A. 25) The jury also failed to find unanimously the following non-statutory mitigating circumstances:

3. That for several decades Dock McKoy has exhibited signs of mental or emotional defect that went untreated.

[5] N.C. Gen. Stat. § 15A-2000(f)(6) (1983). (App. 6a).

[6] N.C. Gen. Stat. § 15A-2000(f)(2) (1983). (App. 5a).

[7] N.C. Gen. Stat. § 15A-2000(f)(7) (1983). (App. 6a).

4. That Dock McKoy's mental and emotional disturbance is aggravated by his poor physical health.

5. Dock McKoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

6. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.[8]

(J.A. 25) Because the jury found at least one mitigating circumstance, it was directed to continue to Issue Three. (J.A. 13, 25)

In Issue Three the jury was asked to decide whether the mitigating circumstances that it had *unanimously found* in Issue Two outweighed the aggravating circumstances unanimously found in Issue One. (J.A. 13-14, 26) As to this issue, the verdict form, which was identical to the trial court's oral instructions (J.A. 13), read:

ISSUE THREE:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances *found by you* is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

(J.A. 26) (emphasis added). The jury answered the third issue "yes."

Pursuant to its instructions the jury then proceeded to the fourth and final issue. (J.A. 14, 26) In Issue Four the jury was asked:

ISSUE FOUR:

[8] This "catch-all" circumstance, which is provided by statute, N.C. Gen. Stat. § 15A-2000(f)(9) (1983), (App. 6a), is listed here with the "nonstatutory" circumstances because it authorizes the jury to consider mitigation that is not expressly provided in the statutory list.

> Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances *found by you?*

(J.A. 26) (emphasis added). In Issue Four, as in Issue Three, the jury was instructed that it could only consider the mitigating circumstances that the jury had unanimously "found." The jury answered this fourth issue "yes."

Finally, the jury was instructed that if it answered Issue Four "yes," it was required to sentence the defendant to death. (J.A. 15, 26) The jury, accordingly, sentenced McKoy to death.

B. Trial Testimony

On the afternoon of December 22, 1984, Dock McKoy, a sixty-five year old laborer, shot and killed Deputy Sheriff Kress Horne. Because the issue presented is the application of *Mills* v. *Maryland*, 486 U.S. ___ (1988), to this particular case, it is necessary to state the facts of record in some detail. Petitioner does this with attention to the testimony that reasonable jurors might have found sufficient to establish mitigating circumstances by a preponderance of the evidence if the jurors had been free to consider all of the mitigating evidence without the restrictions of a unanimity requirement.

1. The State's Guilt Phase Evidence

During the guilt phase of McKoy's trial, witnesses for the State described the events of December 22, 1984 as follows: Around two in the afternoon, McKoy was seen firing a shotgun into the air from the porch of his home

located in a rural area near Wadesboro, North Carolina. Concerned for the safety of children in the neighborhood, a neighbor cautioned McKoy against firing his gun in the air. McKoy responded that everybody else was shooting and that it was Christmas. (Tpp. 448-49)[9] There was no evidence, however, that anyone else had been firing a weapon. In response to a call from the neighbor, a sheriff's deputy came and talked to McKoy through the screen door of McKoy's house. That officer testified that McKoy had acted confused and was highly intoxicated. (Tpp. 506-08) The officer told McKoy that he was too drunk to be firing his gun and that he should wait until he sobered up and then he could go fire it in the surrounding woods. (Tpp. 490)

Between four and five p.m., McKoy fell down in front of his outhouse. His pants were down around his ankles and he appeared unable to get them back up. He was talking to himself, muttering both, "Oh, Lord, help me, help me" and "Don't bother me, don't bother me." (Tpp. 467-68) McKoy could not get back to his feet until a neighbor arrived to assist him. (Tpp. 467-71) Approximately fifteen or twenty minutes later, McKoy locked himself out of his house and hailed Mark Cox, a teenager who lived nearby, for help. When Cox left, McKoy called out for him to come back, asserting that Cox had taken money belonging to him. Cox testified that McKoy subsequently fired two or three shots from his gun in Mr. Cox's direction. (Tpp. 523-30) Cox's sister testified that she was struck by a pellet which "stung her leg," although it did not break the skin. (Tpp. 537-39) The authorities were again summoned.

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[9] References to "Tp" designate the transcript of the trial.

This time Lieutenant Robert Usery and Deputy Kress Horne responded to the call. After speaking with McKoy's neighbors to find out what had happened, the officers called out to McKoy and asked him to come out of his house so the officers could talk with him. (Tp. 572) According to Lieutenant Usery, McKoy first responded that he would kill them if they did not leave and then he stated that he would come out if they left. *Id.* The officers spoke further with McKoy's neighbors and advised them that they would have to obtain a warrant if they wanted to take action against McKoy. (Tp. 573) The officers then once more called for McKoy to come out of the house. McKoy again responded that he would come out if the officers left. They told him they could not do that. (Tp. 574)

After the arrival of additional law enforcement officers, Lieutenant Usery went to the rear of the house to see if he could enter through the back door. Meanwhile, Deputy Horne stood behind the patrol car with his pistol drawn and braced across the roof of the vehicle, while he continued to talk to McKoy. (Tpp. 576-77) Seconds later, McKoy pushed open his screen door and fired a single shot from within the house. Bird shot from that blast struck Deputy Horne in the face. Dr. John Butts, who performed the autopsy, testified that Deputy Horne was killed by two pellets which passed through his right eye and into the brain. (Tpp. 650-51)

After Deputy Horne was shot, the other officers surrounded the house. Usery warned McKoy that if he did not come out of the house the officers would use tear gas. When he received no response from McKoy, Usery fired tear gas through a window. When they heard two shots go off inside, the officers began shooting into the house. (Tpp. 580-81) Shortly afterwards, McKoy came out of the front door carrying the shotgun, unbreeched, in one

hand. (Tpp. 493-97) He was wounded and acted confused. An officer took hold of him and pulled him to the ground. (Tpp. 498-507) McKoy was taken by ambulance to Anson County Hospital in Wadesboro.

Investigators found two expended shells inside the house near the front door and two more in the interior area. (Tp. 656) They also found three half gallon bottles of whisky in the living room as well as a glass containing whisky. The kitchen contained a large number of beer cans and three empty liquor bottles. There was a trail of blood from the kitchen to the front door. (Tp. 657) A partially empty box of shotgun shells was found in the bedroom. Ballistics evidence established that the expended shells had been fired from McKoy's gun and had contained No. 6 bird shot. (Tp. 694)

The State also introduced testimony recounting statements made by McKoy during a custodial interrogation conducted a few hours after the killing. (Tp. 802) During that questioning McKoy gave a rambling account of what he thought happened that day. He stated that a young boy had come to his house and asked for twenty-five cents. McKoy told the boy that he did not have the money and chased him out of the house. The boy returned with two companions and threatened McKoy with harm if he tried to stop them from getting his money. (Tp. 814) The boys ransacked his house and one of them hit him in the back of the head and knocked him down. McKoy chased them from the house and attempted to "pepper them a little bit" with his shotgun. Prior to that time he had been at a neighbor's and consumed a quarter of a pint of whisky and a few swallows of beer. (Tp. 815) He left around 12:30 p.m. and went home to take a nap. After chasing off the boys, McKoy went back to sleep. He was awakened about 2:30 p.m. when police entered his house. (Tp. 816) He told the

police that they should have knocked and that they should be out chasing the boys. The officers left, but returned about fifteen minutes later and wanted to arrest him. They pointed guns at him, but he told them he wasn't going anywhere.

McKoy also said that a white officer had drawn a weapon outside the house and was pointing it at him. When asked why he had shot that officer, McKoy said, "[b]ecause he pressured me, he pressured me the wrong way." (Tp. 818) When asked if he was fearing for his life at that time, McKoy responded that he was fearing for his life right then. He was then asked if he had to do the same thing again, would he do it. His answer was: "I'll fight until I die." (Tpp. 818-19) Asked if he would do it the same way, he answered: "Yes, but I'd probably do it quicker." Asked if he knew he had shot a police officer, McKoy responded, "[s]o what a police officer shot a man around here not long ago." When the question was reiterated, McKoy said, "[s]o what a police officer ain't no more than anybody else." (Tp. 819) McKoy went on to say that the officer was sighting down on him from behind the car and he just sort of raised his shotgun in one hand and fired. *Id.*

2. The Petitioner's Guilt Phase Evidence

Dr. Merceda Perry, an emergency room physician at Anson County Hospital in Wadesboro, testified that he had begun treating McKoy for two serious gunshot wounds at approximately 6:30 p.m. Dr. Perry described those wounds as a puncture wound to the buttocks and laceration through the forehead down to the skull, the latter causing McKoy to be temporarily blind. (Tpp. 843-45) While wounds of the type McKoy had sustained are normally very painful, McKoy did not indicate that he was suffering the normal degree of pain. The doctor attributed those circumstances to the degree of McKoy's

alcohol intoxication. (Tp. 851) McKoy's blood alcohol level was measured as being equivalent to a .264 reading on the breathalyzer scale—a reading consistent, in Dr. Perry's opinion, with McKoy's observed behavior. (Tp. 855)

Dr. Robert Rollins, Clinical Director of the State's forensic psychiatry unit, had examined McKoy prior to trial. (Tpp. 858, 866) He testified that McKoy was suffering from five separate conditions. First, Dr. Rollins testified that McKoy had a personality disorder "characterized by denial, paranoid thinking, concrete thinking, impaired abstract thinking, impaired judgment, impaired insight, impaired perception, overreacting to things, poor interpersonal skills, defensiveness, ineffectiveness in functioning and antisocial behavior." (Tp. 870) Second, Dr. Rollins diagnosed McKoy as suffering from borderline intellectual functioning based on intelligence testing that revealed an IQ of 74. *Id.* The third diagnosis was "episodic alcohol abuse." *Id.* Fourth, Dr. Rollins diagnosed McKoy as suffering from "alcohol intoxication, recovered." *Id.* The fifth diagnosis was that McKoy suffered from "organic delusional syndrome manifested by false beliefs." *Id.* Dr. Rollins specifically considered whether McKoy might have been faking or malingering and concluded that he was not. (Tp. 885)

Mr. McKoy's principal guilt phase defense was that he was legally insane at the time of the offense. Dr. Rollins stated his opinion that "as a result of mental disorder McCoy (sic) was neither able to appreciate the quality of his actions or distinguish between right and wrong" at the time of the offense.[10] (Tp. 889) He further testified that as

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[10] Under North Carolina law the test of insanity as a defense to a criminal charge is the capacity of the defendant to distinguish between right and wrong at the time of and in respect to the matter under investigation. *State* v. *Mize*, 315 N.C. 285, 289, 337 S.E.2d 562, 565 (1985).

a result of McKoy's mental disorder, McKoy was unable to form the specific intent to kill Deputy Horne or to premeditate and deliberate. (Tpp. 889-90) In addition to his opinion that McKoy's mental illness rendered him legally insane and unable to premeditate and deliberate, Dr. Rollins also noted that, in his opinion, McKoy perceived his actions of December 22, 1984, including shooting his gun in the direction of Mark Cox, to be self-defense. (Tp. 895) Dr. Rollins was also of the opinion that McKoy's mental illnesses were long-standing and were exacerbated by his intoxicated condition on December 22, 1984. (Tpp. 884-85)

Mr. McKoy took the stand on his own behalf and gave a bizarre account of the events surrounding the death of Deputy Horne. (Tp. 911) McKoy testified that on the evening of December 21, 1983, he had looked out the door after returning from squirrel hunting and saw the sheriff outside shooting in his front door. He identified the sheriff, as "Sheriff Allen, High Sheriff of Anderson County." The sheriff was alone. The sheriff fired at McKoy's house "a good many times." (Tp. 915) McKoy testified that he walked out to him and asked him what he was doing. The sheriff said he wanted Paul McKoy out there so they could arrest him for "shooting behind children." (Tp. 916) The sheriff also stated that Paul McKoy had "shot my Sheriff in the face and he's in that house and I want him out." *Id.* Sheriff Allen then started shooting at the house again. McKoy told him to quit shooting and stated: "If I had children in there . . . you'd done be killed them." *Id.*

Sheriff Allen read McKoy a warrant for Paul McKoy for shooting at children and then told him that his "party sheriff had been shot and was in the hospital." *Id.* They talked about McKoy's shotgun and Sheriff Allen told him to get it. At that point, the sheriff again started shooting

at the house. McKoy begged him to stop. (Tp. 917) Sheriff Allen then started shooting all around McKoy's feet. McKoy went back into his house, after which the shooting stopped for a while. The sheriff then started yelling that he was tired of waiting on Paul and started shooting again. McKoy went back out and Sheriff Allen made him show his hunting license and told him it was expired. The sheriff started shouting for Paul again and shooting at the house. (Tp. 918) McKoy argued with him about shooting up his house. In response, Sheriff Allen turned his gun on McKoy and started shooting at him again. McKoy ran back into his house. The sheriff renewed his hollering for Paul to come out and McKoy continued to tell the sheriff to quit shooting into his house. *Id.*

Later, various people forced their way into McKoy's house and McKoy was hit on the head. (Tp. 920) When he regained consciousness, people were injecting him with something. *Id.* When he got up another bullet was fired into his bedroom. (Tpp. 921-23) McKoy could remember nothing else of that night. He awoke on Saturday morning and a big fat woman was in his house. (Tp. 924) McKoy later went out to his outhouse and when he returned Sheriff Allen had come back. When McKoy tried to pick the lock on the door to his house, the sheriff began shooting. Sheriff Allen was hollering, "Come out, Paul." McKoy told the sheriff that Paul did not live there, but the sheriff told McKoy that he had seen Paul go in the house earlier that morning. (Tp. 925) Sheriff Allen made McKoy go get his shotgun from the house, like he had the evening before. When the sheriff kept on shooting, McKoy took the shotgun back to the house.

A young boy was in his house when he went in. When McKoy asked what he was doing there, the boy said that if he lay on top of McKoy, Allen would stop shooting. *Id.*

McKoy demanded to know whether the boy was a homosexual. He ordered the boy to leave. *Id.* A variety of people McKoy knew, came to, and subsequently left, the house. (Tpp. 926-27) Some men came to the house and had McKoy turn on his T.V. After the T.V. was turned on, "they went try—like they were dancing and found out that —that the T.V. camera was set up in the house. You could see us, what we were doing in the house on my T.V." (Tp. 927) After that, at least forty or fifty "transporters" gathered in front of the house. (Tp. 928) Eventually, two men came in the house and started appraising the furnishings. (Tp. 929) When McKoy tried to argue with them they pushed him down and handcuffed him. He left the house with them, but outside, Sheriff Allen demanded to know whether McKoy owed rent and a lengthy discussion ensued on that subject.(Tpp. 930-32)

After the others left and after additional shooting by the sheriff, McKoy decided to make himself something to eat, not having eaten anything so far that day. (Tp. 933) As he reached the kitchen and opened a can of sardines, he heard a noise and found that tear gas had been fired into the house. *Id.* Sheriff Allen shouted, "You better come out of there or you'll die in there." *Id.* When McKoy started out the door, Sheriff Allen ordered him to bring his shotgun with him. McKoy returned to the kitchen to get the gun, but before he could walk out the sheriff ordered him to turn and face the wall. When he did so, he was shot in the right hip. (Tp. 934) McKoy spun around and was then shot in the head. *Id.* Two officers jumped out from somewhere and handcuffed him, telling him he would be alright if he did not fight. They put him in a car and took him to the parking lot at the jail. *Id.* He was transferred to another car and taken straight to Raleigh. McKoy testified that he had never been in the hospital in

Wadesboro. (Tp. 934) He denied having drunk any substantial amount of alcohol during the time in which the events testified to occurred. (Tp. 935) He did not remember having his shotgun during that period of time. (Tp. 936) The jury found McKoy guilty of first degree murder. (Tp. 1078)

3. The Penalty Phase Evidence

At the penalty phase of McKoy's trial, the State presented evidence that McKoy had pleaded guilty to second degree murder in 1952. (Tp. 1107)

The defense called Dr. Patricio Lara, a forensic psychiatrist employed by the State at Dorothea Dix Hospital in Raleigh. (Tp. 1110) Dr. Lara diagnosed McKoy as having an adjustment disorder with mixed disturbance of emotions and conduct as well as an underlying personality disorder with mixed paranoid and narcissistic features. (Tpp. 1112-13) Dr. Lara was satisfied that McKoy was suffering from significant psychological disorders that had existed for a number of years and that the effect of those disorders would be exacerbated in situations of stress or when McKoy was also impaired by alcohol. (Tp. 1115)

Dr. Rollins was recalled to the stand and testified that in his expert opinion McKoy was under the influence of a mental or emotional disturbance at the time he shot Deputy Kress Horne. (Tp. 1133)

After instructions from the court, which prohibited the jury from considering any mitigating circumstance which was not unanimously found by a preponderance of the evidence, the jury returned a death verdict.

C. Procedural History

On appeal to the Supreme Court of North Carolina, McKoy challenged, *inter alia*, the judge's instructions

requiring jury unanimity on the existence of a mitigating circumstance before that circumstance can be considered in the penalty decision.[11] *State* v. *McKoy*, 323 N.C. 1, 30, 372 S.E.2d 12, 27 (1988) (J.A. 27, 57). Shortly after this case was briefed and argued in the Supreme Court of North Carolina, this Court decided the case of *Mills* v. *Maryland*, 486 U.S. ___ (1988). Thereafter, the Supreme Court of North Carolina ordered supplemental briefing and additional argument on the question of whether *Mills* might have some impact on this case.

In its opinion, a majority of the Supreme Court of North Carolina identified two differences between the capital sentencing procedures in North Carolina and Maryland. First, the court noted that in *Mills* the jury was instructed to return a death verdict if it found that the aggravating circumstances were not outweighed by the mitigating circumstances; while in North Carolina the jury must also determine that the aggravating circumstances found are sufficiently substantial, when considered in light of the mitigating circumstances found, to call for the death penalty. *State* v. *McKoy*, 323 N.C. at 40, 372 S.E.2d at 33 (J.A. 69). Second, the court held that mitigating evidence is deemed "legally irrelevant" in North Carolina if the mitigating circumstances relating to that evidence are not unanimously found by the jury. *State* v. *McKoy*, N.C. at 40-41, 372 S.E.2d at 33-34 (J.A. 69-70). The court also cited the post-*Mills* denials of certiorari in two North Carolina cases[12] where the unanimity issue

[11] McKoy's trial lawyer requested an instruction that would have permitted those jurors who found some factor to be mitigating to consider it in the sentencing decision even if other jurors disagreed. (J.A. 2) The trial judge denied counsel's requested instruction. (J.A. 3)

[12] *Holden* v. *North Carolina*, *cert. denied*, 469 U.S. 1230 (1988); *Gardner* v. *North Carolina*, *cert. denied*, 469 U.S. 1230 (1988).

was raised as "further support[]" for its position regarding the inapplicability of *Mills* to Dock McKoy's case. *State* v. *McKoy*, 323 N.C. at 43, 373 S.E.2d at 35 (J.A. 74). For these reasons, it was "unable to conclude with any degree of certainty that *Mills* rendered our capital sentencing procedure constitutionally infirm." *State* v. *McKoy*, 323 N.C. at 44, 372 S.E.2d at 35 (J.A. 74).

In dissent, the Chief Justice of the state supreme court, joined by Justice Frye, expressed the view that the unanimity requirement imposed on Dock McKoy's jury violated the Eighth and Fourteenth Amendments as construed in *Mills*. They noted that, as in *Mills*, under North Carolina law the unanimity requirement creates an unconstitutional risk that jurors can be prevented from considering mitigating circumstances that they might wish to consider in deciding whether to impose the penalty of death. *State* v. *McKoy*, 323 N.C. at 52, 372 S.E.2d at 44 (J.A. 85) (Exum, C.J., dissenting). Further, according to the dissenters, the majority's argument that mitigating circumstances that were not unanimously found ceased to be legally relevant, "stands *Mills* and the Eighth Amendment jurisprudence upon which it rests on their respective heads." *State* v. *McKoy*, 323 N.C. at 54, 372 S.E.2d at 45 (J.A. 87) (Exum, C.J., dissenting).

After the decision in *McKoy*, this Court vacated and remanded the judgment of the Supreme Court of North Carolina in another capital case in the light of *Mills*. *Lloyd* v. *North Carolina*, ___ U.S. ___, No. 87-6833 (October 3, 1988). Three days later, the Supreme Court of North Carolina reaffirmed its *McKoy* holding. *State* v. *Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988). The state court was aware of this Court's order in *Lloyd* when it decided *Allen*. *State* v. *Allen*, 323 N.C. at 237, 372 S.E.2d at 872 (Exum, C.J., dissenting).

Dock McKoy's petition for the writ of certiorari was docketed in this Court on November 17, 1988. On November 18, 1988, the Supreme Court of North Carolina reconsidered its decision in *Lloyd* in light of *Mills* and again reaffirmed its holding in *McKoy. State* v. *Lloyd*, 323 N.C. 622, 374 S.E.2d 277 (1988). On February 21, 1989, this Court granted the writ.

SUMMARY OF ARGUMENT

The instructions at McKoy's trial expressly prohibited the entire jury from considering any mitigating circumstances not unanimously "found." These instructions violated this Court's holding in *Mills* v. *Maryland*, 486 U.S. ___ (1988), by precluding any juror from giving consideration to mitigating evidence unless all twelve jurors agreed on the existence of a mitigating circumstance relating to that evidence. Thus, a single juror had the power to block the entire jury from considering substantial mitigating evidence that McKoy had proffered as a reason to spare his life.

A majority of the court below relied on two differences between the capital sentencing procedures in North Carolina and Maryland to uphold these instructions. First, the court noted that in Maryland a death sentence is compelled if aggravating circumstances outweigh mitigating circumstances, while in North Carolina a death sentence is not compelled unless the aggravating circumstances are also found to be sufficiently substantial, in light of the mitigating circumstances unanimously found, to call for death. Second, the court decided that in North Carolina unless a mitigating circumstance is found to exist by all twelve jurors the evidence relating to that circumstance is rendered "legally irrelevant" and thus drops from the jury's consideration. These perceived differences do not distinguish the instructions given in this case from those condemned in *Mills*.

Mills is not limited to cases in which death is compelled when aggravation outweighs mitigation. Rather, the constitutional violation condemned in *Mills* is the preclusion of any relevant mitigation in the penalty decision. Moreover, notwithstanding North Carolina's novel interpretation of "legal relevancy," this Court has consistently held that the Eighth Amendment forbids interposing barriers to the sentencer's consideration of aspects of the defendant's character and record and the circumstances of the offense that the defendant offers as a basis for a sentence less than death. As a federal constitutional matter, such barriers are prohibited whether they are interposed by statute, by the sentencing court, by an evidentiary ruling, or by a single juror's vote against finding mitigating circumstances. *Mills* v. *Maryland*, 486 U.S. at ___, slip op. at 7 (citations omitted).

The risk that a single juror could block consideration of mitigation and consequently require the imposition of a death sentence rendered these instructions unconstitutional under *Mills*.

ARGUMENT

A. The Trial Court's Instructions To The Jury, Allowing One Juror To "Blackball" The Entire Jury's Consideration Of Evidence In Mitigation, Plainly Violates The Rule Of *Mills*.

Mills v. *Maryland*, 486 U.S. ___ (1988), squarely controls this case. Indeed, this case presents none of the instructional ambiguity that divided the Court in *Mills*. Ralph Mills's death sentence was rendered unconstitutional by a jury instruction that could reasonably have been construed as requiring the jury to agree unanimously that a mitigating circumstance existed before

mitigating evidence relating to that circumstance could be considered in the sentencing decision. By contrast, the jurors at Dock McKoy's capital sentencing trial were *expressly* forbidden to consider any evidence in mitigation of the penalty of death unless all twelve jurors unanimously "found" the existence of the mitigating circumstance supported by that evidence. Under this instruction each juror was, in effect, given a "blackball" that permitted a single holdout juror to prevent the other eleven jurors from considering mitigating evidence. Thus, the jury was required to return a death sentence even if eleven jurors were firmly convinced that mitigating circumstances existed and rendered a death sentence inappropriate.

The sentencing instructions told Mr. McKoy's jury that it could consider mitigating evidence as bearing upon its penalty decision in two distinct ways. First, the jury might determine that the mitigating circumstances *unanimously found* outweighed the aggravating circumstances unanimously found (Issue Three). Second, the jury could determine that the mitigating circumstances *unanimously found* sufficiently abated the effect of the aggravating circumstances so that the latter would not call for death (Issue Four). Neither the Supreme Court of North Carolina nor the Respondent has ever contested that the instructions forbade the consideration of mitigating evidence *for either purpose* unless the mitigating circumstances supported by that evidence were unanimously found by the jury. Further, neither the Respondent nor the Supreme Court of North Carolina disputes that under this system *a single juror* has the power to preclude the entire jury from considering mitigating circumstances and the evidence relating to those circumstances, notwithstanding that the circumstances

are found to exist, and to call for a life sentence, by the other eleven members of the jury. Also, as in *Mills*, the jury would be required to return a death sentence even if all twelve jurors agreed that mitigating circumstances had been shown by a preponderance of the evidence which called for a life sentence, so long as the jurors could not unanimously agree as to any one particular mitigating circumstance.

Out of the six "unfound" mitigating circumstances in this case, two were statutory mitigating circumstances and four were non-statutory mitigating circumstances. In North Carolina, statutory mitigating circumstances are deemed to have mitigating value as a matter of law. *State* v. *Stokes*, 308 N.C. 634, 653, 304 S.E.2d 184, 196 (1983). The trial judge must submit to the jury any statutory mitigating circumstances where there is "sufficient evidence from which the jury could reasonably infer that these mitigating circumstances existed." *Id.* As to non-statutory mitigating factors, the judge must submit as a mitigating circumstance any fact that is propounded by the defendant, supported by the evidence, and that a juror could reasonably deem to have mitigating value. *State* v. *Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056 (1982). The jury must then decide both whether a non-statutory factor is factually proved and whether it has mitigating value. *See id.*, at 26, 292 S.E.2d at 223, *citing State* v. *Johnson*, 298 N.C. 47, 72-74, 257 S.E.2d 597, 616-17 (1979).

A single juror in this case could have used his blackball to thwart findings in mitigation under Issue Two and thus to preclude any consideration of that mitigation under Issues Three and Four in a variety of ways. Eleven jurors, for example, could have been convinced by a preponderance of the evidence of the existence of the statutory

mitigating circumstance that the murder was committed while Dock McKoy was under the influence of mental or emotional disturbance. These eleven jurors could have believed that this powerful mitigating circumstance, either alone or in combination with the other mitigation, was sufficient reason to spare Dock McKoy's life.[13] Nevertheless, the disagreement of a single juror that this mitigating circumstance was established by a preponderance of the evidence would preclude the other eleven jurors from giving any consideration whatsoever to the evidence supporting the circumstance.

All twelve of the jurors probably agreed that McKoy was sixty-five years old. Eleven of the jurors might have found that this circumstance had mitigating value which, if considered, would make the death sentence inappropriate. Yet the view of a single juror that this uncontested fact was not mitigating could prevent the entire jury from considering McKoy's advanced age in deciding the appropriate sentence.

Likewise, all but one of the jurors could have believed that Dock McKoy's mental and emotional disturbances were aggravated by his poor physical health and that this was a mitigating factor. One holdout juror could prevent

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[13] The present Chief Justice of the North Carolina Supreme Court has noted that of the mitigating circumstances set out by statute in North Carolina this circumstance, along with the mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired," N.C. Gen. Stat. § 15A-2000(f)(6), seem to be the most important. Exum, *The Death Penalty in North Carolina*, 8 Campbell L.Rev. 1, 8 (1985). Chief Justice Exum noted that a death sentence was especially rare in those cases in which both of these factors were found by the jury. *Id.* In this case, the jury found that Dock McKoy's capacity was impaired.

the entire jury from considering this circumstance in mitigation.

Eleven of the twelve jurors could have credited and found mitigating the fact that McKoy had exhibited signs of mental and emotional disease for decades, and that this illness went untreated. But if one juror dissented as to the underlying facts *or* on the factor's mitigating value, that juror could keep the entire jury from considering *both* the facts *and* the circumstance.

Finally, eleven of the jurors could have determined from the evidence that other circumstances existed that were mitigating. For instance, eleven jurors could have agreed with Dr. Rollins's opinion that McKoy believed he was acting in self-defense at the time he shot Deputy Horne. These eleven jurors further could have found that McKoy's belief that he was acting in self-defense was mitigating. As with the circumstances that were specifically enumerated, however, a lone juror could prevent all of the remaining jurors from giving any consideration to this, or any other, circumstance which the other eleven jurors agreed existed and was mitigating.

In *Mills*, the petitioner suggested that under Maryland's capital sentencing scheme, eleven jurors might agree that there were mitigating circumstances, but since one juror disagreed, no mitigation would be found and a death verdict would be returned even though eleven jurors thought the penalty inappropriate. This Court held that "it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances so postulated by petitioner . . . ." *Mills*, 486 U.S. at ____, slip op. at 6. On this point the operation of the Maryland and North Carolina sentencing schemes is indistinguishable. Both permit a single juror

to blackball the entire jury's consideration of mitigating evidence, and both could require a jury to return a death verdict even though eleven of the twelve jurors agree in finding the existence of mitigation that makes the death penalty wholly inappropriate. "The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Mills*, 486 U.S. at ____, slip op. at 16. This case must therefore be reversed under *Mills* v. *Maryland*.

B. Substantial Mitigating Evidence Was Precluded From The Jury's Consideration In Determining Whether Dock McKoy Should Live Or Die.

Competent evidence was presented to support each of the six mitigating circumstances submitted to, but not unanimously found by, the jury.

The jury was instructed in the penalty phase that there was no requirement that evidence submitted in the guilt phase be resubmitted in the penalty phase. Rather, the court instructed that "[a]ll of the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment." (Tp. 1175) Dr. Robert Rollins, a forensic psychiatrist who is the Clinical Director of the forensic unit at Dorothea Dix state mental hospital (Tpp. 859-860, 865), testified on McKoy's behalf at both the guilt and penalty phases of trial. Dr. Rollins was appointed by the trial court over McKoy's strenuous objection. McKoy sought the appointment of an "independent psychiatrist." (Mp. 21)[14] Instead, the court appointed Dr. Rollins, an employee of the State of North

[14] References to "Mp" designate the transcript of the pre-trial motions hearings.

Carolina. Dr. Rollins has regularly testified for the prosecution as well as for the defense in capital murder cases in North Carolina.[15]

Dr. Rollins testified that he received his medical degree from Duke University, that he is one of only 165 board certified specialists in Forensic Psychiatry in the country, that he is a lecturer in psychiatry at Duke University and a professor of psychiatry at the University of North Carolina Medical School in Chapel Hill. He is a past president of the North Carolina Psychiatric Association and Chairman of the Section on Psychiatry and Neurology of the North Carolina Medical Society. In addition, Dr. Rollins told the jury that in his capacity as Clinical Director of the state's forensic psychiatry unit, he had testified as an expert in the field of forensic psychiatry about two hundred times and that he performs about three or four hundred forensic psychiatric examinations a year. He explained that he had not only testified as an expert witness on behalf of the prosecution in many cases, but that he had previously testified as an expert for the very prosecutor who was trying Dock McKoy. (Tpp. 860-64)

Dr. Rollins informed the jury that Dock McKoy was an extremely disturbed individual with a long history of

[15] *See e.g.*, *State* v. *Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986) (Dr. Rollins testified on behalf of State in guilt phase of capital trial that defendant was able to form specific intent to kill); *State* v. *Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983) (Dr. Rollins testified on behalf of State that capital murder defendant's claimed amnesia could not be confirmed, that he knew the nature and consequences of his acts, and could distinguish between right and wrong); *State* v. *Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975) (Dr. Rollins testified that defendant was without psychosis, was not insane, and was "just mean"); *State* v. *Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985) (Dr. Rollins testified on behalf of State that murder defendant knew that it was wrong to kill victim).

extensive mental illness. He diagnosed McKoy as suffering from severe mental or emotional disorders that included "organic hallucinosis" and paranoia. McKoy's mental and emotional disturbance influenced virtually every aspect of his judgment and ability to reason. Indeed, Dr. Rollins diagnosed McKoy as a man whose mental illness was so severe that it made him unable to distinguish right from wrong or to premeditate and deliberate. McKoy's mental illness, in Dr. Rollins's opinion, caused McKoy honestly to believe that he was acting in self-defense when he shot Deputy Horne and when he shot in the direction of Mark Cox.

Dr. Patricio Lara also testified on behalf of McKoy in the penalty phase of the trial. He has practiced psychiatry at Dix's Forensic Unit since 1968. (Tp. 1110) Dr. Lara's examination of McKoy occurred when McKoy was sent to Dix Hospital on the State's motion for a competency examination. Dr. Lara found that McKoy suffered from, "an adjustment disorder with mixed disturbance of emotions and conduct. We also confirmed an underlying personality disorder with mixed paranoid narcissistic features. . . ." (Tpp. 1112-13)

The State presented no psychiatric testimony. The testimony of Dr. Rollins and Dr. Lara provided ample evidence from which members of the jury could have been persuaded of the existence of the "unfound" mitigating circumstances. Dr. Rollins specifically noted that, in his opinion, McKoy was under the influence of a mental or emotional disturbance at the time Deputy Horne was killed. (Tp. 1133) Nevertheless, the jury failed to find the statutory mitigating circumstance that the murder was committed while Dock McKoy was under the influence of mental or emotional disturbance.

Additionally, there was uncontradicted evidence that Dock McKoy was sixty-five years old and suffered from high blood pressure, blindness in one eye, heart problems, a neurogenic bladder, and a hernia. (Tp. 882, 1113) According to Dr. Rollins, McKoy's physical problems and very limited education aggravated his mental and emotional problems. (Tp. 882) Dr. Rollins testified, "I thought the blindness in one eye, the history of high blood pressure, were both conditions that would predispose Mr. McCoy (sic) both to paranoid kinds of problems and to organic delusional syndrome kind of problems." (Tp. 886) Yet, the jury failed to find both the statutory mitigating circumstance of the defendant's age at the time of the offense, and the non-statutory mitigating circumstance that "Dock McKoy's mental and emotional disturbance is aggravated by his poor physical health." (J.A. 25)

There was evidence from Dr. Rollins to support the non-statutory mitigating circumstance that "Dock McKoy's ability to remember the events of December 22, 1984, is actually impaired." (Tp. 900) McKoy's own bizarre testimony as to the events of that day took on added significance in the light of Dr. Rollins's finding that McKoy was not malingering. (Tp. 885) Further, a reasonable juror could have found the existence of the non-statutory mitigating circumstance that "[f]or several decades Dock McKoy has exhibited signs of mental or emotional defect that went untreated." (J.A. 25) Both Dr. Lara and Dr. Rollins believed that McKoy's mental and emotional disorders were longstanding. Dr. Rollins said that McKoy had suffered from these disorders since his twenties. (Tp. 883) Dr. Lara indicated that, in his opinion, McKoy's personality disorder had existed for "a substantial period of time" (Tp. 1115), perhaps even from childhood. (Tp. 1114)

Because the jury failed to achieve unanimity as to these circumstances, it was prohibited from considering any of

the substantial evidence relating to the circumstances in deciding whether Dock McKoy should live or die. It took only the vote of a single juror against finding the presence of these mitigating circumstances—or, in the case of the non-statutory mitigating circumstances, a single juror's vote that the circumstance, though factually proved by a preponderance of the evidence, should not be deemed mitigating—to block the entire jury from considering the circumstances when the jury balanced the aggravating circumstances "found" against the mitigating circumstances "found." Likewise, when the jury turned to deciding whether the aggravating circumstances "found," considered in light of the mitigating circumstances "found," were sufficiently substantial to call for death, the jurors were again forbidden to consider any of the mitigation that was not unanimously found. Thus, precisely as in *Mills*,

> "[a]ny mitigating circumstance not so marked ["yes"], even if not unanimously rejected, could not be considered by any juror. A jury following the instructions set out in the verdict form could be "precluded from considering, *as a mitigating factor*, [an] aspect of a defendant's character or record [or] a circumstanc[e] of the offense that the defendant profferfed] as a basis for a sentence less than death," *Skipper* v. *South Carolina*, 476 U.S. [1, 4 (1986)], if even a single juror adhered to the view that such a factor should not be so considered.

Mills, 486 U.S. at ____, slip op. 12.

C. North Carolina's Capital Sentencing Procedure Is Constitutionally Indistinguishable From The Maryland Procedure Condemned in *Mills*.

The Supreme Court of North Carolina identified two differences between the North Carolina and Maryland capital sentencing procedures.

1. North Carolina's Fourth Question

First, the court noted that in Maryland the jury is required to impose the death penalty if the aggravating circumstances outweigh the mitigating circumstances. In North Carolina, before the jury is required to return a death verdict, it must make the additional finding that the aggravating circumstances found, considered in light of the mitigating circumstances found, are sufficiently substantial to call for the imposition of the death penalty. *State* v. *McKoy*, 323 N.C. at 40, 372 S.E.2d at 33 (J.A. 68-69).

The existence of this additional requirement does not cure the unconstitutional effect of precluding consideration of mitigating circumstances unless they are unanimously found. *Both* the Third Issue *and* Fourth Issue submitted to McKoy's jury forbade the jurors to treat any evidence as mitigating unless they first unanimously agreed in finding the specific circumstance supported by that evidence. The court below does not suggest that North Carolina's system anywhere allows for consideration of blackballed mitigation. Rather, it implies that since North Carolina makes it more difficult for the jury to return a death sentence it is distinguishable from Maryland. *State* v. *McKoy*, 323 N.C. at 40, 372 S.E.2d at 33 (J.A. 69-70) The point seems to be that because North Carolina may require a higher threshold of aggravation than does Maryland before a death sentence is compelled, it is constitutionally permissible to allow a single juror to preclude consideration of mitigating evidence.

Assuming that the Supreme Court of North Carolina is correct in characterizing the aggravating circumstance aspect of North Carolina's sentencing scheme as more

demanding than that of Maryland,[16] there is no support for the idea that this difference justifies in North Carolina what is *Lockett*[17] error in Maryland. The suggestion that *Mills* turned on some "mandatory" feature of the Maryland statute which is absent in North Carolina simply misapprehends *Mills* and the *Lockett* doctrine upon which *Mills* relies.

Mills holds that permitting one juror to prevent consideration of any relevant mitigation by the entire jury violates a capital defendant's right to have the sentencer consider *all* relevant mitigation. In other words, imposing a barrier to the consideration of *any* relevant mitigation violates *Mills*. The fact that in *Mills* the unconstitutional barrier led to the death verdict by one step was not the basis of the constitutional violation. Two unconstitutional steps are equally bad. As the *Mills* opinion plainly shows, the constitutional violation there, as here, consisted of a jury instruction that risked the preclusion of consideration of relevant mitigating evidence:

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[16] It is not at all clear that this assumption is correct. It appears that the ten statutory aggravating circumstances set out in the Maryland sentencing statute, Md. Ann. Code, Art. 27, § 413(d), are drawn significantly more narrowly than the eleven statutory aggravating circumstances in North Carolina. *Cf.* N.C. Gen. Stat. § 15A-2000(e) (1983). For example, unlike North Carolina, there is no "especially heinous, atrocious, or cruel" aggravating circumstance in Maryland. *See generally Maynard* v. *Cartwright*, 486 U.S. ____ (1988); *Godfrey* v. *Georgia*, 446 U.S. 420 (1980). Further, one of the aggravating factors relied upon by the North Carolina jury to make the petitioner's aggravating circumstances sufficiently substantial to call for the death penalty—that the defendant had previously been convicted of a felony involving the threat or use of violence—would not be available under the Maryland statute. Md. Ann. Code, Art. 27, § 413(d).

[17] *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett* v. *Ohio*, *supra*; *Hitchcock* v. *Dugger*, [481 U.S. 393 (1987)]; by the sentencing court, *Eddings* v. *Oklahoma*, [455 U.S. 104 (1982)]; or by an evidentiary ruling, *Skipper* v. *South Carolina*, [476 U.S. 1 (1986)]. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, if petitioner's interpretation of the sentencing process is correct, the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider *all* of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Eddings* v. *Oklahoma*, 455 U.S. at 117, n.* (O'Connor, J., concurring).

Mills, 486 U.S. at ____, slip op. at 7 (emphasis supplied).

Mills did not turn on the fact that the jury happened to find *no* mitigation but instead on the fact that the jury instructions permitted *any* mitigating evidence to be kept from consideration by a single juror blackball. Nor was the opinion limited to cases where the jury *must* impose the death penalty once the mitigation has been improperly excluded. Rather, the Court stated that "it would certainly be the height of arbitrariness to *allow or require* the imposition of the death penalty" where a risk exists that mitigation has been precluded by the vote of one lone juror. *Mills*, 486 U.S. at ____, slip op. at 6 (emphasis supplied).

Further, the cases relied upon by this Court in *Mills* do not support the idea that precluding the jury from considering relevant mitigating evidence violates the Eighth Amendment only if all possible mitigating evidence is precluded or if the sentencer must impose the death

penalty if it finds no mitigation. On the contrary, *Mills* and the cases upon which it relies stand for the constitutional rule that the death penalty may not be imposed where there is a barrier to the sentencer's consideration of *any part* of the case for mitigation. Improper exclusion of *all* mitigation is not necessary for reversible *Lockett* error. This Court applied *Lockett* to order new sentencing hearings in *Hitchcock*, *Skipper*, and *Eddings* although in every one of these cases, the sentencer considered some—but not all—relevant mitigation.

It is true that Dock McKoy's jury, unlike Ralph Mills's, theoretically could have avoided the imposition of the death penalty by finding the aggravating circumstances alone insufficiently substantial to call for death. Still, precluding the consideration of *any* mitigating evidence in the ultimate sentencing decision is no less a *Lockett* error merely because the jury could have returned a life sentence on the basis of something *other than* the precluded mitigation. The sentencers in *Hitchcock*, *Skipper*, and *Eddings* were also free to return life sentences on bases other than the mitigating evidence that was kept from their consideration. Nevertheless, in all three cases a *Lockett* violation was found. As this Court reiterated in *Mills*, "'[b]ecause the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.'" *Mills*, 486 U.S. at ___, slip op. at 7 (*quoting Eddings* v. *Oklahoma*, 455 U.S. at 117, n.* (O'Connor, J., concurring)).

2. Legal Relevance

In *Mills*, this Court pointed out in a footnote that "[n]o one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered legally 'irrelevant' by one holdout vote." *Mills*, 486 U.S. at ___, n.7, slip op. at 6, n.7. The Supreme Court of North Carolina seized upon that footnote to find a second difference between the capital sentencing procedure in North Carolina and that of Maryland. It held that in North Carolina "evidence in effect becomes *legally irrelevant* to prove mitigation if the defendant fails to prove to the satisfaction of all the jurors that such evidence supports the finding of a mitigating factor." *McKoy*, 323 N.C. at 40, 372 S.E.2d at 33 (J.A. 69-70) (emphasis supplied). This novel interpretation of "legal relevancy" fails to pass constitutional muster under the *Lockett* doctrine. *Skipper*, 476 U.S. at 7.

Until *McKoy* was decided, the law of relevancy in North Carolina had always been that "[t]he competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury." 1 H. Brandis, NORTH CAROLINA EVIDENCE, §8, at 32, n.7 (3rd ed. 1988), *citing Queen City Coach Co.* v. *Lee*, 218 N.C. 320, 11 S.E.2d 341 (1940). *See, generally*, N.C. R. EVID. 103(c), 402. In his dissent in *McKoy*, the Chief Justice of the Supreme Court of North Carolina unmasks the problems with the majority's new view of relevancy.

> "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *New Jersey* v. *T.L.O.*, 469 U.S. 325, 345, 105 S.Ct. 733, 744-45, 83 L.Ed.2d 720, 737 (1985), quoting Fed.R.Evid. 401. As noted by Thayer, "The law furnishes no test of relevancy." E. Thayer, *A Preliminary Treatise on Evidence at the*

> *Common Law* 265 (1898) The concept of logical relevancy employed in Rule 401 must be kept separate from issues of sufficiency of evidence for any purpose such as to satisfy a burden of production. M. Graham, *Handbook of Federal Evidence* § 401.1 (2d ed. 1986). This concept of relevancy is the same in the context of mitigating evidence in a capital sentencing proceeding as it is in other contexts. Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered. *Id.* at § 401.1 n.12.

State v. *McKoy*, 323 N.C. at 55-56, 372 S.E.2d at 45 (J.A. 88-89) (Exum, C.J., dissenting).

Notably, the "legal relevancy" rationale appears for the first time in *McKoy*, although the state supreme court first approved North Carolina's unanimity requirement five years earlier. In *State* v. *Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), the court addressed a challenge to the requirement that jurors unanimously agree upon mitigating circumstances before they may consider mitigating evidence relating to that circumstance. The jury instructions in *Kirkley* did not inform the jury whether or not it had to be unanimous on mitigating circumstances. After retiring to deliberate, Kirkley's jury requested additional instruction on whether it was required to be unanimous as to the existence of a mitigating circumstance. The trial judge told the jurors that they must be unanimous to find a mitigating circumstance. *Kirkley*, 308 N.C. at 230, 302 S.E.2d at 163-64 (Exum, J., dissenting).

On appeal to the Supreme Court of North Carolina, the defendant challenged this unanimity instruction, arguing that it violated the *Lockett* doctrine. The defendant argued that if unanimity was indeed required, the jury should have been instructed that it had to be unanimous to reject, as well as to find, the existence of a mitigating circumstance. *Cf. Mills*, 486 U.S. at ___, slip op. at 3 (Rehnquist, C.J., dissenting). At that time, the State agreed that a unanimity requirement was "constitutionally suspect" under the *Lockett* doctrine. *Kirkley*, 308 N.C. at 229, 302 S.E.2d at 163. The State's brief acknowledged that, in light of *Lockett*, "[i]t would seem manifestly improper, then, not to permit members of the jury to consider a factor in mitigation simply because all members of the jury were not satisfied with the defendant's showing concerning a particular mitigating circumstance." *Id.* (quoting from the State's Brief.)

Despite arguments from both the defendant and the State that the unanimity requirement could allow a single juror to preclude the remaining jurors from considering mitigating evidence and thus run afoul of *Lockett*, the Supreme Court of North Carolina held that North Carolina law requires just such a procedure. The court declared that since the jury was required to be unanimous to find the existence of an aggravating circumstance, "consistency and fairness" dictated that unanimity was required for mitigating circumstances as well. The *Kirkley* court made no mention of the concept of legal relevancy as a justification for the unanimity requirement. It was not until after *Mills* came down that the phrase "legally irrelevant" was first used by the Supreme Court of North Carolina to describe mitigating evidence blackballed by one or more jurors. This usage was urged upon the court by the Attorney General of North Carolina

in his supplemental brief filed after the decision in *Mills*. *Supplemental Brief of Appellee at* 11, State v. *McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988) (No. 585A85).

In *Mills*, this court addressed a Maryland Court of Appeals decision that engaged in the very kind of creative jurisprudence that the Supreme Court of North Carolina performed in *McKoy*. Indeed, the *Mills* court noted that the dissenting opinion in the Maryland Court of Appeals complained that the construction of the Maryland statute given by the majority "'appears out of the blue after nearly ten years of extensive litigation involving this statute.'" *Mills*, 486 U.S. at ____, slip op. at 12-13 (citations omitted). *See also Skipper*, 476 U.S. at 6 (1986) (expressing skepticism about the integrity of South Carolina's argument that the precluded mitigating evidence was irrelevant under state law). Similarly, "legal relevance" makes its debut as a legal justification for the North Carolina blackball after years of litigation on the subject.

But even taken at face value, North Carolina's state-law holding that evidence rejected by as few as one juror is "legally irrelevant" must bow to the defendant's Eight Amendment right to have the sentencer consider evidence pertaining to the defendant's character, background, and the circumstances of the offense. *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). In *Skipper*, the State of South Carolina defended its exclusion of mitigating evidence relating to the defendant's future adaptability to prison life by labelling such evidence "irrelevant" to the character, prior record, or circumstances of the offense. After noting that the distinction between evidence of past behavior in prison and future adaptability to prison life was an "elusive" one, this Court concluded:

> Assuming, however, that the rule would in any case have the effect of precluding the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment, the rule would not pass muster under Eddings.

Skipper, 476 U.S. at 7. That is equally the case here.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays the court to vacate the judgment of the Supreme Court of North Carolina insofar as it sustains the imposition of the death penalty.

Respectfully submitted,

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APPENDIX

APPENDIX

NORTH CAROLINA GENERAL STATUTES

CAPITAL PUNISHMENT.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty.—

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any

matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury.—Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether, the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the

jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death.—When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence.—

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of

death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances.—Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances.—Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

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QUESTION PRESENTED

May a state constitutionally channel jury discretion in capital sentencing by requiring the defendant to bear the burden of proving a factor in mitigation unanimously?

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No. 88–5909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOCK MCKOY, JR.,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE RESPONDENT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The State of North Carolina, by and through its attorney, the Attorney General of North Carolina, files this Brief.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On December 22, 1984, Dock McKoy, Jr. murdered Anson County Deputy Sheriff Kress Horne. The Anson County grand jury returned an indictment against McKoy for this first-degree murder. Trial venue was changed to Stanly County, where McKoy was tried at the July 29,

1985 Criminal Session of Stanly County Superior Court, presided over by the Honorable William H. Freeman. At the conclusion of the guilt-innocence phase, the jury returned a guilty verdict of first-degree murder.

During the penalty phase, the jury found two aggravating factors unanimously and beyond a reasonable doubt. Further, they found two of the eight submitted mitigating factors unanimously and by a preponderance of the evidence. The jury found unanimously and beyond a reasonable doubt that the two aggravating factors outweighed the two mitigating factors. Finally, the jury found unanimously and beyond a reasonable doubt that the two aggravating factors, when considered with the two mitigating factors, were sufficiently substantial to warrant imposition of the death penalty. The jury unanimously recommended that Dock McKoy be sentenced to death.

McKoy appealed his judgment to the Supreme Court of North Carolina. After this Court's issuance of its opinion in *Mills v. Maryland*, 486 U.S. ___, 108 S.Ct. 1860 (1988), the Supreme Court of North Carolina ordered further briefing and oral argument in light of *Mills*. On September 7, 1988, the Supreme Court of North Carolina held, in a 5–2 opinion, that North Carolina's unanimity requirement as to mitigating factors did not violate *Lockett v. Ohio*, 438 U.S. 586 (1978) or *Mills*. *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988). McKoy petitioned this Court for a writ of certiorari on November 15, 1988. On February 21, 1989, this Court granted the writ of certiorari.

B. Statement of Facts

In 1984, Dock McKoy[1] resided in Anson County, North Carolina (T. 440–41).[2] On the morning of December 22,

[1]For clarity, the petitioner will be referred to as "McKoy."
[2]References to "T" designate the transcript of the trial.

1984, McKoy's neighbor, Haywood Haskell, observed McKoy standing on his front porch with a shotgun (T. 447–48). McKoy fired two shots into the air. Mr. Haskell told McKoy that he should not fire the weapon because he could harm the children in the neighborhood. McKoy replied that it was Christmas and that everyone was shooting. Mr. Haskell telephoned law enforcement officials to report the incident (T. 448).

At approximately 11:50 a.m., Deputy Calvin Lambert of the Anson County Sheriff's Department received the report that McKoy was drunk and was firing a shotgun (T. 484). Deputy Lambert was in uniform when he responded to the call and drove to the scene in a marked patrol car (T. 485). Mr. Haskell directed him to McKoy's house (T. 487). As he reached the porch, the deputy called to McKoy through the screen door and told McKoy that he needed to see him concerning a complaint. Receiving no response, Deputy Lambert again asked McKoy if he would step onto the porch. McKoy stood in the doorway and looked through the screen door (T. 489). Deputy Lambert believed that McKoy was intoxicated (T. 507–08). The deputy told McKoy not to fire the gun because he was drunk. Deputy Lambert advised McKoy not to go outside and not to endanger people in the neighborhood by firing his weapon (T. 489). McKoy asked if he could fire his shotgun in the woods, and the deputy told him to sober up first. As Deputy Lambert drove away, McKoy stepped onto the porch and said something to the deputy. Deputy Lambert stopped his vehicle and asked McKoy what he said. McKoy turned and went inside without answering. After remaining a few moments to make certain McKoy did not come back outside, Deputy Lambert left the area (T. 490).

Later that afternoon, McKoy fell down a wet bank in front of his outhouse and yelled for help (T. 467). Another neighbor, Mr. Harshaw, helped him up the hill (T. 467–68). Because McKoy was locked out of the house, they pried

open a window to get inside. Once McKoy was back inside, Mr. Harshaw left (T. 468).

Shortly afterwards, McKoy asked thirteen-year-old neighbor Mark Cox to help close the window which had previously been pried open (T. 468). Mark asked McKoy to get him a hammer. When McKoy refused, Mark walked back to Mr. Haskell's. McKoy then accused Mark of taking a one-hundred dollar bill (T. 521). Mr. Haskell tried to explain that the boy did not have the money because he had not been inside the house (T. 456). In fact, earlier Mr. Harshaw had found McKoy's wallet and returned it (T. 468). However, McKoy refused to listen and fired his shotgun at the young boy. Immediately, Mark ran toward his own house for safety. As Mark ran, McKoy fired two more shots in Mark's direction. Some other children were in the line of fire (T. 453). Continuing to flee from McKoy, Mark ran inside his home (T. 525).

Lilly Smith, Mark's sister, was standing in Mark's front yard with her two young daughters, ages seven and four, and Purcell Sellers (T. 532–34). When they saw McKoy walking down the street with a shotgun, they ran towards the rear of the house (T. 535). As they reached the corner, McKoy again fired the shotgun, and a pellet struck Ms. Smith's leg (T. 536). Purcell Sellers was also struck during this episode (T. 573).

Ms. Smith locked the back door and was on her way to lock the front door when McKoy barged into their house holding his shotgun (T. 537). When Ms. Smith attempted to explain to McKoy that Mark did not have the money, McKoy told her to be quiet and twice threatened to shoot her. Ms. Smith grabbed her young daughter by the hand and left the house. Finally, McKoy left and the police were called (T. 538).

Lieutenant Robert Usrey and Deputy Kress Horne of the Anson County Sheriff's Department received the call at approximately 4:45 p.m. that someone was shooting at

some children (T. 569–70). They entered the driveway between Mr. Haskell's house and McKoy's house in a patrol car (T. 570–71). Lieutenant Usrey was driving and his door was nearest McKoy's house. Lieutenant Usrey got out of the patrol car and spoke with Mr. Haskell. Deputy Horne stood by the patrol car (T. 571).

After this conversation, the officers asked McKoy to step out of the house so they could talk. McKoy refused and ordered them to leave or he would kill them. Deputy Horne again asked McKoy to step out so they could get the matter cleared up. McKoy replied that if the officers left he would come outside. Lieutenant Usrey again spoke with Mr. Haskell about McKoy (T. 572). The officer then walked around the Haskell residence and spoke with Ms. Smith and Mr. Sellers who had previously been struck by pellets from McKoy's shotgun (T. 573). He advised them to go to the magistrate's office and obtain a warrant for McKoy's arrest. At this time Deputy Horne was standing on the passenger's side of the patrol car at the rear door (T. 573).

Lieutenant Usrey returned to the patrol car. Again, the officers requested that McKoy come outside and talk to them. During this period, Detective John Moore arrived on the scene. McKoy, still refusing to come out of his house, told the officers to leave and then he would come outside. They replied that they could not leave, that they wanted to straighten the matter out (T. 574). By this time Deputy Henry Watkins had arrived. He was instructed to transport Ms. Smith and Mr. Sellers to the magistrate's office and to inform the other officers when the warrants had been obtained (T. 575). Lieutenant Usrey spoke with Mr. Haskell concerning the floor plan of McKoy's house. Afterwards, he returned to the patrol car where Deputy Horne was still stationed at the rear door and the officers discussed what they would do once the warrants had been obtained. They determined that Deputy Horne and the

other officers would continue to talk to McKoy in an effort to persuade him to come outside while Lieutenant Usrey would try to enter through the back of the house (T. 576). Lieutenant Usrey went to the back of McKoy's house to try to locate an entrance. Deputy Horne continued to call to McKoy (T. 576–77).

As Lieutenant Usrey was returning to the front of McKoy's house, McKoy aimed his shotgun out the door and fired (T. 577). The blast struck Deputy Horne and caused him to collapse. McKoy gave no warning to the officer before he fired (T. 548). When Lieutenant Usrey called out to the other officers, Detective Moore answered, but Deputy Horne did not respond. Lieutenant Usrey then observed Deputy Horne lying on his back and heard a gurgling noise coming from the downed officer (T. 578). As he got closer to Deputy Horne, Lieutenant Usrey observed blood squirting upward six to ten inches from Horne's face. An ambulance was called and after it arrived, Lieutenant Usrey took a stretcher and crawled to Deputy Horne. When he reached Deputy Horne, he saw that his face was obliterated, leaving only a mass of bloody tissue. Deputy Horne was still bleeding from the mouth and his hand was twitching (T. 579). An ambulance attendant responded to Lieutenant Usrey's plea for assistance, crawled to Deputy Horne and assisted in placing him on a stretcher. They managed to pull Deputy Horne approximately twenty feet to safety where he was placed in an ambulance (T. 580). Later that evening, Deputy Horne died as a result of the injuries to his face and brain (T. 638, 644).

As other officers arrived, McKoy was ordered to throw his weapon outside but he did not respond. The officers warned McKoy that if he did not surrender, tear gas would be used. When he did not answer, a tear gas container was thrown through a window (T. 580). At that point McKoy fired another shot. Approximately thirty seconds later,

McKoy fired an additional shot. The officers began returning fire and McKoy was wounded superficially. After this short exchange, McKoy appeared at the door, holding his shotgun pointed downward. McKoy continued to hold the shotgun despite having been ordered to throw it down. Detective Moore approached McKoy from behind and took the shotgun. McKoy was then handcuffed and transported to Anson County Hospital (T. 580–82).

Special Agent Carl Jackson of the State Bureau of Investigation observed McKoy at the hospital at approximately 8:15 p.m. (T. 807–08). Following his release from the hospital, McKoy was taken to the parking lot of the Sheriff's Department (T. 808). He had a bandage over his head which partially covered his left eye. Agent Jackson and two other officers transported McKoy to Raleigh in the Sheriff's Department van. En route, McKoy was read his *Miranda* rights (T. 809). McKoy responded that he understood his rights (T. 811). At *voir dire* the officers testified that he stated, "[I] was tried for my life and I understood all this stuff" (T. 704). During the trip, McKoy stated that he was thirsty. The officers stopped the van and purchased two soft drinks for him (T. 812). Thereafter, Agent Jackson asked McKoy what had happened earlier that day at his house (T. 813). McKoy related that some boys came into his house, hit him and took his money. He stated that he chased the boys and shot for the purpose of scaring them (T. 814). He said after this incident the police came to his house and talked to him about shooting at the boys. According to McKoy, he then told the police that they should be out chasing those boys. McKoy stated that the police left, but later returned and wanted to arrest him. He told them that he was not going anywhere. McKoy stated that an officer drew his weapon. McKoy told the agent that he had consumed half a pint of whiskey and some beer earlier that day. McKoy then told Agent Jackson that he was tired and wanted to take a break (T. 815–16).

Because McKoy said he was cold, the heat was turned up in the van. After a short period, Agent Jackson asked McKoy if he wanted to talk. McKoy stated that he did not want to talk to him (T. 817). Deputy Pratt then asked McKoy if he wanted to talk to him and McKoy agreed (T. 716, 817–18). When asked why he shot the deputy, McKoy responded that "he pressured me the wrong way." Deputy Pratt asked McKoy if he was afraid for his life and McKoy replied that he was afraid at that moment. The officers assured him that he was being taken to Central Prison for safekeeping and that the officers were there to protect him. McKoy was asked "if you had it to do all over again the same way, you would?" He responded, "'I'll fight until I die.'" He continued by stating, "Yes, but I'd probably do it quicker." When Deputy Pratt asked McKoy if he knew he had shot a police officer, McKoy stated, "'So what, a police officer ain't no more to shoot than anybody else'" (T. 818–19).

Dr. Merceda Perry, a physician at Anson County Hospital, treated McKoy in the emergency room for a laceration of the skull and a wound to the left buttock (T. 840, 842–43). McKoy neither complained of any pain nor was he given any medication for pain. However, a tetanus shot and local anesthesia were administered before treatment. At first, McKoy did not respond coherently to the doctor's questions (T. 846). Dr. Perry noted that McKoy had a strong odor of alcohol (T. 847) and at approximately 6:30 p.m., McKoy's blood alcohol level was .26 (T. 848–49). According to Dr. Perry, McKoy was not in shock. The doctor also noted that McKoy received about three fourths of a quart of intravenous fluid at the hospital (T. 851). After receiving the fluids, Dr. Perry explained that McKoy began "coming around" (T. 852). Before leaving the hospital, McKoy was answering the doctor's questions in a coherent manner (T. 853). McKoy acknowledged to Dr. Perry that he had shot a police officer (T. 855). Dr. Perry released McKoy to be transported to the medical

unit at Central Prison (T. 857).

Dr. Bob Rollins, a forensic psychiatrist at Dorothea Dix Hospital, testified as a defense witness (T. 858). Rollins first examined McKoy on June 20, 1985 (T. 890), while McKoy was in jail in Stanly County awaiting trial (T. 866). At the time of this examination, McKoy was sixty-five years old and blind in his right eye (T. 868). Dr. Rollins diagnosed McKoy as having a basic personality disorder. In addition, it was his opinion that McKoy was "borderline intellectual functioning," having scored 74 on an IQ test. He stated, however, that McKoy was not mentally retarded. Other diagnoses included "episodic alcohol abuse," "alcohol intoxication, recovered," and "organic delusional syndrome" (T. 870). In the doctor's opinion, McKoy could not distinguish between right and wrong at the time of the offense (T. 889).

On cross-examination, Dr. Rollins related that in 1980 McKoy scored 89 on an IQ test (T. 891). Dr. Rollins also noted that McKoy had held a job for approximately four years with the State Department of Transportation and that he was employed at the time of the shooting (T. 902–03). Dr. Rollins believed McKoy understood right from wrong at the time of the trial (T. 903).

McKoy testified in his own behalf (T. 911). He stated that he had been working on the "tar gang" for about four years (T. 912). According to McKoy, on the day of the incident, the Sheriff came to his house and shot at his door. The Sheriff told him he had come to arrest "Paul McCoy" (T. 915). On cross-examination McKoy testified that he had not had any trouble performing his job and he did not drink liquor (T. 936–37). McKoy acknowledged that in 1977 he had been convicted of shooting at some persons with a shotgun (T. 940).[3] However, he denied

[3] *See State v. McCoy* [sic], 34 N.C.App. 567, 239 S.E.2d 300 (1977) (McKoy's 1977 convictions for discharging a shotgun into an occupied dwelling and four assaults with a deadly weapon were upheld.)

shooting a police officer (T. 984). The jury returned a verdict of guilty of first-degree murder (T. 1078).

At the sentencing phase of the trial before the same jury, pursuant to N.C. Gen. Stat. 15A-2000 *et seq.* (1983), Ms. June Monroe, the Assistant Clerk of Court for Scotland County (T. 1086), identified a certified copy of a commitment of McKoy for the charge of second-degree murder to a term of years entered November 28, 1952 (T. 1104–05). This plea and judgment showed that McKoy entered a plea of guilty to second-degree murder (T. 1106–07).[4]

Dr. Patricio Lara, a psychiatrist at the forensic unit of Dorothea Dix Hospital, testified that at the time of the offense, McKoy's intoxication, together with his limited intellectual functioning and personality disorder, resulted in an impairment of his ability to conform his conduct with the requirements of the law (T. 1110, 1116–17).

On cross-examination, Dr. Lara noted that when he examined McKoy in February, 1985, two months after the murder, McKoy's speech was clear and his thought process was coherent (T. 1117–18). Dr. Lara found no evidence of hallucinations, delusions, or psychosis. In Dr. Lara's opinion, McKoy's paranoid beliefs resulted from his personality disorder (T. 1119). McKoy's supervisor at work had reported that McKoy was a good worker and was never intoxicated on the job (T. 1120). Dr. Lara noted that McKoy was able to care for himself. When Dr. Lara examined McKoy, he found him competent to stand trial (T. 1127). Dr. Lara explained that in general it was not unusual for persons charged with crimes to have personality disorders (T. 1128).

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[4]*See State v. McCoy* [sic], 236 N.C. 121, 71 S.E.2d 921 (1952). (McKoy's 1951 conviction for a first-degree murder—perpetrated with an axe and knife—and death sentence were reversed and remanded for a new trial. Upon remand he pled guilty to second-degree murder.)

McKoy recalled Dr. Rollins during the sentencing phase. He testified that McKoy was under the influence of a mental or emotional disturbance at the time of the shooting, and that McKoy's ability to appreciate the criminality of his conduct was impaired (T. 1132–33).

The following issues as to punishment were submitted to and answered by the jury:

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: Yes.

* * *

1. Had Dock McCoy been previously convicted of a felony involving the use of violence to the person?

ANSWER: Yes.

2. Was this murder committed against a deputy sheriff while engaged in the performance of his official duties?

ANSWER: Yes.

* * *

Issue Two:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: Yes.

* * *

1. This murder was committed while Dock McCoy was under the influence of mental or emotional disturbance.

ANSWER: No.

2. The capacity of Dock McCoy to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER: Yes.

3. The age of Dock McCoy at the time of this murder is a mitigating circumstance.

ANSWER: No.

4. That for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated.

ANSWER: No.

5. That Dock McCoy has borderline intellectual functioning with an IQ test score of 74.

ANSWER: Yes.

6. That Dock McCoy's mental and emotional disturbance is aggravated by his poor physical health.

ANSWER: No.

7. Dock McCoy's ability to remember the events of December the 22nd, 1984, is actually impaired.

ANSWER: No.

8. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER: No.

* * *

Issue Three:

4. Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER: Yes.

* * *

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER: Yes.

(J.A. 23–26)

SUMMARY OF ARGUMENT

The North Carolina capital sentencing instructions suffer from no constitutional infirmity. Unlike the instructions found defective in *Mills v. Maryland*, 486 U.S. ___, 108 S.Ct. 1860 (1988), North Carolina's instructions clearly guide the jury's consideration of evidence proffered in mitigation, including its determination of the continued legal relevance of that evidence. Therefore, *Mills* does not control since *Mills* addressed ambiguous sentencing instructions, not the validity of burdens of proof in capital cases.

North Carolina's requirement that mitigating factors, as well as the aggravating factors against which they are weighed, be found unanimously does not offend *Lockett v. Ohio*, 438 U.S. 586 (1978). All evidence proffered in mitigation is fully considered by the jury in deciding which mitigating factors have been proved to exist. Evidence sufficiently reliable to support a mitigating factor remains legally relevant for use at all stages of the sentencing process. Evidence that is insufficiently reliable to convince the entire jury that it supports a mitigating factor loses its continued relevancy for the balancing stages of the sentencing proceeding.

The unanimity requirement for proof of mitigating factors is simply a burden of proof of the type states historically have been free to impose upon a defendant. There is nothing unique about capital sentencing in North Carolina which mandates an exception to the state's traditional right to ensure that mitigation "has been established with reasonable certainty." *Patterson v. New York*, 432 U.S. 192, 209 (1977). The burden of proof guarantees that standardless sentencing not occur. It furthers the eighth amendment goal of reliability in sentencing by ensuring that only evidence reliably proven, both in aggravation and mitigation, forms the basis for the sentencing recommendation. It serves to focus and channel juror discretion as approved by a plurality of this Court in *Franklin v. Lynaugh*, 487 U.S. ___, 108 S.Ct. 2320 (1988).

North Carolina's sentencing structure, especially with its fourth issue which calls upon the jury to make the discretionary decision of whether the death penalty is warranted, creates no danger that the burden of proof imposed upon the defendant will mandate a death sentence or cause the jury to return an unreliable sentence of death.

Nothing about the present case casts doubt on the appropriate policy choice North Carolina has made in trying to accommodate with a fine precision the competing interests of "clear guidance to assure relative equality in treatment, and discretion to consider individual factors whose weight cannot always be preassigned. . . ." *Lockett*, 438 U.S. at 620 (Marshall, J., concurring).

ARGUMENT

A STATE MAY CONSTITUTIONALLY CHANNEL JURY DISCRETION IN CAPITAL SENTENCING BY REQUIRING THE DEFENDANT TO BEAR THE BURDEN OF PROVING A FACTOR IN MITIGATION UNANIMOUSLY.

This case presents a corollary of the issue addressed by a plurality of this Court in *Franklin v. Lynaugh*, 487 U.S. ___, 108 S.Ct. 2320 (1988): In an effort to achieve a more rational and equitable administration of the death penalty, may a state constitutionally channel jury discretion in capital sentencing by requiring the defendant to bear the burden of proving a factor in mitigation unanimously? Or, stated in another manner: To ensure reliability, may a state deem evidence "legally irrelevant" for further use in a capital sentencing procedure if that evidence is not found by the jury unanimously to support a mitigating factor? *Mills v. Maryland*, 486 U.S. ___, 108 S.Ct. 1860, 1865 n. 7 (1988).

There is no assertion by McKoy that he was precluded from introducing for the jury's consideration any particular mitigating evidence. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Likewise, he makes no argument that there was less than full consideration of his mitigating evidence by all the jurors at an initial stage of the sentencing proceeding. Rather, he simply is dissatisfied with the point at which the jury terminated its consideration of evidence proffered in mitigation which was not found unanimously to support a mitigating factor. His conclusion that North

Carolina's unanimity requirement "plainly violates" *Mills* oversimplifies the issue. (Brief at 19) According to McKoy, since theoretically a single juror had the power to prevent or, in McKoy's terminology, "blackball" the entire jury from considering a mitigating factor, the North Carolina unanimity requirement is unconstitutional. He belittles the distinctions drawn by the Supreme Court of North Carolina as misapprehending *Mills* and as "creative jurisprudence." (Brief at 30, 36)

It is McKoy who misapplies *Mills*. The concern in *Mills* was not whether Maryland could, consistent with the eighth amendment, require unanimity as to the finding of mitigating factors. Rather, *Mills* involved possible ambiguity in instructions concerning the further use and consideration of evidence conceded to be relevant under Maryland law. As Justice White stated, concurring in *Mills:* "The issue in this case is how reasonable jurors would have understood and applied their instructions. That is the issue the Court's opinion addresses, and I am persuaded that the Court reaches the correct solution." 108 S.Ct. at 1872. The burden of proof issue was not presented to or decided by this Court in *Mills*.[5] Therefore, *Mills* cannot be construed as prohibiting states from requiring defendants in capital cases to carry a traditional burden of persuasion as to matters particularly within their own knowledge.

Here, in accordance with North Carolina's well-established evidentiary rules, the sentencing instructions unambiguously guided the jury in its consideration of evidence proffered in mitigation by McKoy. The jury reasonably understood that it could not continue to consider "irrelevant" mitigating evidence—that is, evidence found by less than a unanimous jury—to support a factor in mitigation. It is the absence of ambiguity in the sentencing instructions that renders *Mills* not controlling in this case. North Carolina's unanimity requirement is a constitutionally acceptable method of channelling jury discretion "by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Franklin*, 108 S.Ct. at 2320, *quoting*, *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion).

[5]This Court has recognized that a unanimity requirement takes on the characteristics of a burden of proof. "We perceive nothing unconstitutional or invidiously discriminatory, however, in a State's insisting that its burden of proof be carried with more jurors where . . . more severe punishments are at issue." *Johnson v. Louisiana*, 406 U.S. 356, 364 (1972).

A. Mills v. Maryland Does Not Hold Unanimity Requirements Per Se Unconstitutional.

"The decision in *Mills* appears to be statute-specific." *State v. McKoy*, 323 N.C. 1, 43, 372 S.E.2d 12, 35 (1988). It does not pronounce a broad constitutional rule prohibiting states from imposing, as a matter of policy, burdens of proof designed to channel and focus sentencer discretion in capital cases. *Franklin*. In *Mills*, this Court, in a 5–4 decision, held that instructions which might have precluded jurors from considering in mitigation evidence which the Maryland Court of Appeals had held remained relevant throughout the balancing process, risked the erroneous imposition of a sentence of death in violation of *Lockett; Eddings v. Oklahoma*, 455 U.S. 104 (1982); and *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

Pursuant to Maryland's capital sentencing procedure, when an aggravating factor is found unanimously but no mitigating factors are found, the sentencer, without any further consideration of the appropriateness of the punishment, must return a sentence of death. Once the sentencer finds mitigating factors, these factors are weighed against the aggravating factors previously found. If the jury determines the aggravating factors outweigh the mitigating factors, a death sentence must be imposed. Md. Ann. Code art. 27 § 413 (1987 Rep. Vol.).

In response to an argument that a unanimity requirement, combined with the Maryland statute's lack of discretion, converts the statute as applied into a mandatory one, the Maryland Court of Appeals made a policy choice in *Mills v. State*, 310 Md. 33, 527 A.2d 3 (1987). The Maryland court held, as a matter of state law, that evidence introduced in mitigation remained relevant to the sentencing process even where a criminal defendant had failed to carry his burden of unanimously proving the existence of a mitigating factor based upon that evidence. The Maryland court then concluded the instructions given in *Mills* had transmitted that interpretation of state law to the sentencing jury.

In the view of five members of this Court, the instructions actually given to the jurors in *Mills* likely did not convey to the jury the "saving construction" placed on the statute by the Court of Appeals. Rather, reasonable jurors could have believed they were precluded from continuing to consider relevant evidence in mitigation during the balancing process if that evidence had not been found unanimously to support a mitigating factor.

Justice Blackmun, writing for the majority, noted that the Maryland Court of Appeals had not suggested, nor had the State of Maryland argued, that mitigating evidence could be rendered "legally irrelevant" by failure of the jury to find unanimously the evidence supports a particular mitigating factor. 108 S.Ct. at 1865 n. 7. While not the basis for the Court's decision, concern for the mandatory and draconian consequences of a failure to find a mitigating factor was clearly present in *Mills*. 108 S.Ct. at 1864–65. *Mills* repeatedly emphasized the ambiguity of the instructions possibly required a death sentence when the jury may have felt a lesser sentence appropriate.

Thus, *Mills* considered the limited issue of whether the sentencing instructions given accurately guided individual jurors in considering evidence in mitigation concededly relevant pursuant to state law, and whether the ambiguity in the instructions presented an issue of constitutional dimensions due to the lack of juror discretion in the Maryland sentencing scheme. *Mills* did not hold that the eighth amendment precludes states, *per se*, from placing a burden of persuasion on a defendant to prove the existence of mitigating factors unanimously. Presented now directly with this issue, this Court should not so hold. To do so would undermine North Carolina's proper "role in structuring or giving shape to the jury's consideration of . . . mitigating factors." *Franklin*, 108 S.Ct. at 2329.

B. North Carolina Procedure

1. Legal Relevancy Determination

North Carolina, unlike Maryland, has made the policy determination that evidence not found unanimously to support a mitigating factor cannot be used during the final weighing and balancing steps of its death penalty sentencing procedure. Due to the differences between the Maryland and North Carolina sentencing proceedings, North Carolina's policy choice presents no risk of an arbitrary sentencing result, but guarantees that the sentencing occur pursuant to objective reviewable standards.

In reliance on the assurances given by this Court in *Patterson v. New York*, 432 U.S. 192 (1977), North Carolina places a burden of proof upon a defendant to prove the existence of the mitigating factors upon which he relies by a preponderance of the evidence. *State v. Johnson*, 298 N.C. 47, 75 n. 28, 257 S.E.2d 597, 618 n. 28 (1979). In 1983, the Supreme Court of North Carolina affirmed in *State v. Kirkley*, 308 N.C. 196, 217–19, 302 S.E.2d 144, 157 (1983), *overruled on other grounds*, *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988), that this evidentiary burden requires juries to find the existence of factors in mitigation, like factors in aggravation, unanimously. The Court

stated:

> The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances. The unanimity requirement is only placed upon the finding of whether an aggravating or mitigating circumstance exists. With the exceptions of who has the burden of proof and the different quantum of proof required to establish the existence of a circumstance, we see no reason to distinguish the method a jury must use in finding the existence or nonexistence of aggravating and mitigating circumstances during the sentencing procedure. It must be kept in mind that when the sentencing procedure begins there are no aggravating or mitigating circumstances deemed to be in existence. Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case.
>
> In determining whether a mitigating circumstance exists, the jury is free to consider all the evidence relevant to that circumstance. This procedure is in accord with the requirements of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Oklahoma*, ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). We therefore find no error in the trial judge's instructions to the jury concerning the unanimity requirement on mitigating circumstances.

308 N.C. at 219, 302 S.E.2d at 157.

Evidence insufficiently reliable to convince the entire jury of the existence of a mitigating factor becomes, in effect, legally irrelevant for further use in the sentencing

proceeding. *McKoy*, 323 N.C. at 40–41, 372 S.E.2d at 33. "If all jurors do not agree on a specific mitigating circumstance, then the defendant has failed to meet his or her burden of proof on that circumstance and the evidence regarding it is not legally relevant for sentencing purposes." 323 N.C. at 41, 372 S.E.2d at 34.[6] As emphasized by the Supreme Court of North Carolina, this determination of the continued legal relevance of evidence is an important distinction between *Mills* and this present matter. *McKoy*, 323 N.C. at 40–41, 372 S.E.2d at 33. The cases in which this Court has addressed issues concerning the introduction and consideration of a defendant's evidence proffered in mitigation have consistently referred to "relevant mitigating evidence." *Hitchcock*, 481 U.S. at 393; *Eddings*, 455 U.S. at 114; *Lockett*, 438 U.S. at 604.

Contrary to McKoy's argument, *Skipper v. South Carolina*, 476 U.S. 1 (1986) does not preclude this type of relevancy determination. In *Skipper*, this Court held that a state could not declare as irrelevant and inadmissible categories of evidence which arguably supported a basis for a sentence less than death. The relevancy determination required here is of an entirely different character. It in-

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[6]McKoy suggests that the North Carolina Supreme Court's determination in his case that evidence is "legally irrelevant" if it is insufficiently reliable to prove the existence of a mitigating factor unanimously is merely a sham or *pendente lite* ruling designed to avoid the perceived holding in *Mills*. Such an assertion is unwarranted. This Court, in *Eddings v. Oklahoma*, 455 U.S. 104, 113 n. 9 (1982) recognized that a petitioner need not provide "citation to book and verse" in order to present appropriately an issue for review by the Court pursuant to its *certiorari* jurisdiction. So too, a finding that evidence is irrelevant for further use in a sentencing process need not be specifically denominated "legally irrelevant" when that is the result of the decision. *State v. McKoy* simply expressed explicitly what had been implicit since the 1983 decision of the Supreme Court in *State v. Kirkley*: Evidence proffered to prove mitigation, just as evidence proffered to prove aggravation, loses its continued relevancy for use in the balancing steps of a capital sentencing proceeding if it is insufficiently reliable to convince all twelve jurors of its existence.

volves the continued viability of evidence which failed to survive a traditional burden of proof standard. *Skipper*, like *Lockett*, "does not hold the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." *Franklin*, 108 S.Ct. at 2329. *Skipper* has no application to a relevancy requirement such as the present one. Continued relevancy in this context simply pertains to the state ensuring that jury consideration of mitigating evidence not be undirected or unfocused, but rather channelled in an effort to achieve a rational sentencing determination. *Franklin*, 108 S.Ct. at 2330.

2. Capital Sentencing Procedure

In North Carolina, capital sentencing is solely by the jury. N.C. Gen. Stat. § 15A-2000(a) (1983). It is a four-step progression culminating in the return of a binding recommendation of a life or death sentence. The jury's findings concerning each of the four steps, where reached, must be recorded on an issues and recommendation sheet. N.C. Gen. Stat. § 15A-2000(c) (1983). This form helps to guide the jurors throughout the sentencing process. The Supreme Court of North Carolina also employs this issues sheet in conducting its statutorily mandated proportionality review. N.C. Gen. Stat. § 15A-2000(d) (1983). *See State v. Noland*, 312 N.C. 1, 320 S.E.2d 642, *cert. denied*, 469 U.S. 1230 (1984).

In the first step, the jury must find unanimously and beyond a reasonable doubt the existence of one or more of the eleven statutory aggravating factors. N.C. Gen. Stat. 15A-2000(e) (1983). Failure of all twelve to agree requires a finding that the factor does not exist. *Kirkley*, 308 N.C. at 219, 302 S.E.2d at 157. If one or more aggravating factors are found, in the second step the jury must unanimously determine—but by only a preponderance of the evidence—the existence of any statutory or non-statutory mitigating factors. *Kirkley*. If all twelve fail to agree on a mitigating factor, then the jury answers that the factor does not exist. *Kirkley*.

In the third step, the sentencer balances the factors proven in aggravation and mitigation against each other. The state must prove unanimously and beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors. N.C. Gen. Stat. § 15A-2000(c) (1983). If the state carries its burden, or if no mitigating factors have been found, the jury then determines the fourth issue. This step requires the state to prove again unanimously and beyond a reasonable doubt that the proven aggravating factors, as diminished by the proven mitigating factors, are sufficiently substantial to warrant imposition of the death penalty. *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865 (1983). Only if the jury finds the aggravating factors sufficiently substantial to warrant imposition of the death penalty is the jury permitted to return a recommendation of death. *Id.*

Thus, in addition to proving statutory aggravating factors, the state must overcome unanimously and beyond a reasonable doubt two discretionary hurdles before a death sentence must be recommended by a North Carolina jury. The requirements that the state prove the presence of aggravation, that the aggravating factors outweigh any mitigating factors, and that the aggravating factors as diminished by mitigating factors are sufficiently substantial to warrant imposition of the death penalty place evidentiary burdens on the state far in excess of that required constitutionally. *Zant v. Stephens*, 462 U.S. 862, 874–75 (1983). These requirements demonstrate that the state, not the defendant, bears nearly the entire risk of nonpersuasion. *See Bullington v. Missouri*, 451 U.S. 430, 446 (1981). Failure by the state to carry its burdens of proving unanimously that at least one aggravating factor exists, that the aggravating outweigh the mitigating factors, or that the aggravating factors are sufficiently substantial to

warrant a death sentence mandates life. Therefore, under North Carolina's capital punishment procedure, the risk condemned in *Mills*—that one juror's actions compel the death penalty—simply is not present. The defendant has only the minimal burden of proving the presence of mitigating factors unanimously by a preponderance of the evidence. Failure to carry this burden does not automatically mandate a sentence of death. The only real risk falls upon the state—a single juror may prevent the state from carrying its burden on one of the three issues that must be answered affirmatively before the jury may recommend a death sentence. In North Carolina, one juror may force the imposition of a life sentence, but not a death sentence.

The weighing of proven factors in aggravation against the factors found in mitigation creates no presumption that death is the appropriate sentence. Juries in North Carolina frequently have returned life sentence recommendations even after answering in Issue Three that the proven factors in aggravation are not outweighed by the proven mitigating factors. Thus, the fourth sentencing issue in North Carolina guarantees that lack of unanimity as to mitigating factors cannot alone compel a death sentence.[7] As the Supreme Court of North Carolina recog-

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[7]In *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986) the jury in the sentencing phase found two statutory factors in aggravation but found no factors in mitigation. Yet, the jury returned a recommendation of life imprisonment after determining that the aggravating circumstances found were not sufficiently substantial to call for the imposition of the death penalty.

In at least twenty-three other capitally-tried cases, juries have returned life sentence recommendations after finding both factors in aggravation and mitigation and after finding that the factors in aggravation outweighed the mitigating factors. However, these juries have found the aggravating factors not to be sufficiently substantial to call for the imposition of the death penalty. *State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989); *State v. Drayton*, 323 N.C. 585, 374 S.E.2d 262 (1988); *State v. Darden*, 323 N.C. 356, 372 S.E.2d 539 (1988); *State v. James*, 321 N.C. 676, 365 S.E.2d 579 (1988); *State v.*

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Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988); *State v. Fisher*, 321 N.C. 19, 361 S.E.2d 551 (1987); *State v. Austin*, 320 N.C.276, 357 S.E.2d 641 (1987); *State v. Williams*, 319 N.C. 73, 352 S.E.2d 428 (1987); *State v. Holland*, 318 N.C. 602, 350 S.E.2d 56 (1986); *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986); *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986); *State v. Davis*, 317 N.C. 315, 345 S.E.2d 176 (1986); *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986); *State v. King*, 316 N.C. 78, 340 S.E.2d 71 (1986); *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986); *State v. Sidden & Blankenship*, 315 N.C. 539, 340 S.E.2d 340 (1986); *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986); *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985); *State v. Spangler*, 314 N.C. 374, 333 S.E.2d 722 (1985); *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985); *State v. Payne*, 312 N.C. 647, 325 S.E.2d 205 (1985); *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982).

In two additional cases, after finding factors in aggravation and in mitigation, and finding that the aggravating factors outweighed the mitigating factors, the juries were unable to unanimously agree on the substantiality issue and a life sentence was imposed by the trial court. *State v. Massey*, 316 N.C. 558, 342 S.E.2d 811 (1986); *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985).

Prior to the 1983 decision of the Supreme Court of North Carolina in *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983), which mandated the present order of submission of the sentencing issues, the substantiality issue was often presented to the sentencing jury as the second issue. This order followed the statute. N.C.Gen. Stat. § 15A-2000(c) (1983). The jury was asked to determine whether statutory aggravating factor(s) existed and, if so, to then determine whether such a circumstance(s) found by them was sufficiently substantial to call for the imposition of the death penalty. Then, as now, these determinations were made unanimously beyond a reasonable doubt. In at least twelve cases in which that order was followed, juries found at least one factor in aggravation but found the factor(s) insubstantial, resulting in the imposition of a life sentence. This determination obviated the jury's reaching any evidence proffered by that defendant in mitigation. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982); *State v. Fox*, 305 N.C. 280, 287 S.E.2d 887 (1982); *State v. Bauguss*, 310 N.C. 259, 311 S.E.2d 248 (1984); *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984); *State v. Bare*, 309 N.C. 122, 305 S.E.2d 513 (1983); *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983); *State v. Smith & Smith*, 301 N.C. 695, 272 S.E.2d 852 (1981); *State v. Clark*, 301 N.C. 176, 270 S.E.2d 425 (1980); *State v. Weimer*, 300 N.C. 642, 268 S.E.2d 216 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980); *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979) (on remand for resentencing).

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nized the *McKoy* decision below, this fourth issue is one of the important distinguishing features between North Carolina's procedure and the Maryland procedure reviewed in *Mills:*

> First, the instructions to the jury as to when it must impose the death penalty are different. Maryland's procedure required the jury to impose the death penalty if it "found" at least one aggravating circumstance and did not "find" any mitigating circumstances. It also required the jury to impose the death penalty if it unanimously found that the mitigating circumstances did not outweigh the aggravating circumstances. Issue Three here requires the jury to weigh the "found" mitigating circumstances against the "found" aggravating circumstances. In contrast to the Maryland procedure, however, it does not mandate the death penalty where there are no mitigating circumstances and at least one aggravating circumstance, nor does it mandate the death penalty if the mitigating circumstances do not outweigh the aggravating circumstances. Rather, it requires the jury then to answer Issue Four. Issue Four ensures that a jury may return a

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The foregoing clearly demonstrates that the substantiality issue is hardly an illusory step in North Carolina's weighing and balancing process. Requiring juries to determine this issue, unanimously beyond a reasonable doubt, ensures against arbitrary action by a juror mandating a death sentence.

(Because a life sentence was imposed in these cases, the reported opinions of the Supreme Court of North Carolina often do not discuss the specific issue resolution by the jury in the sentencing phase. Consequently, the State of North Carolina has lodged with this Court copies of the issue sheets in each of the cited cases. These documents were obtained from either the official record on appeal from the Supreme Court of North Carolina or the official court file of the Clerk of Superior Court of the county in which the case was tried.)

> recommendation of life imprisonment if it feels that the aggravating circumstances are not sufficiently substantial to call for the death penalty, even if it has found several aggravating circumstances and no mitigating circumstances. Maryland's capital-sentencing procedure, which the Supreme Court found constitutionally infirm in *Mills*, did not include a section equivalent to Issue Four here.

McKoy, 323 N.C. at 40, 372 S.E.2d at 33.

The North Carolina sentencing procedure creates no danger that "a single juror could block...consideration [of mitigation] and consequently require the jury to impose a death sentence." *Mills*, 108 S.Ct. at 1870. Thus, North Carolina's sentencing procedure can accommodate constitutionally the burdens of proof placed upon the parties.

C. This Case Is Not Controlled By Lockett v. Ohio.

The Supreme Court of North Carolina held that its relevancy requirement and fourth sentencing issue distinguished North Carolina's unanimity requirement from the *Mills* holding. McKoy belittles these distinctions as making no difference in analyzing the constitutionality of North Carolina's unanimity requirement. He contends that precluding consideration of any mitigating evidence in the ultimate sentencing decision "is no less *Lockett* error merely because the jury could have returned a life sentence on the basis of something other than the precluded mitigation." (Brief at 32) He further states that "*Mills* and the cases upon which it relies stand for the constitutional rule that the death penalty may not be imposed where there is a barrier to the sentencer's consideration of *any part* of the case for mitigation." (Brief at 32) (emphasis original)

Contrary to McKoy's assertions, *Mills* does not hold

that a unanimity requirement is an automatic *Lockett* error. This Court set aside Mills' death sentence out of concern that the Maryland instructions possibly precluded the jury from continuing to consider relevant mitigating evidence. *Mills* does not prohibit a state from precluding jury consideration of legally irrelevant evidence.

If *Mills* stands for the proposition that the state can at no time remove from jury consideration initially relevant evidence which subsequently fails to meet a reliability standard, then any instruction requiring the jury or the individual jurors to hold the defendant to any standard of proof as to the evidence presented is just as violative of *Mills* and *Lockett* as the unanimity requirement employed by North Carolina.[8] Such a result substantially undermines the objectivity of the sentencing process. The application of binding evidentiary standards is an integral part of a capital sentencing structure. Standards help to promote reliability and uniformity among the cases in the jurisdiction. To remove from the state the right to demand that all evidence—mitigating as well as aggravating—used in the sentencing process be reliably proven would endanger the eighth amendment goal of rationality in the capital sentencing process. This course inevitably would allow juries to base their recommendations on individual whim, supposition, emotion, or even prejudice, rather than on reliably proven factors.

If this Court is prepared to accept McKoy's argument that the standardless consideration of evidence proffered in mitigation is a constitutional requirement, then it will have travelled full circle since *Furman v. Georgia*, 408 U.S. 238 (1972), holding that the very aspect of capital

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[8]In *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) *(limited en banc), cert. pending*, ___ U.S. ___, 88-1553 (filed March 20, 1989), the Ninth Circuit has already, on the basis of *Lockett*, prohibited burdens of proof as to existence of mitigation and thereby begun a retreat toward the standardlessness condemned in *Furman v. Georgia*, 408 U.S. 238 (1982).

punishment that once made it unconstitutional—totally unguided juror discretion—now is necessary to comply with the eighth amendment. That this untrammelled discretion would occur as to mitigating evidence does not diminish the seriousness of this standardlessness. Society, as well as the defendant, has a stake in the outcome of the sentencing hearing. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). While occasional grants of mercy are not unconstitutional, *Gregg v. Georgia*, 428 U.S. 153, 199 (1976), it is important that sentences of life, like sentences of death, appear based on reason, not mere sympathy or prejudice—factors which should not "play any role in the jury's sentencing determination, even if such factors might weigh in the defendant's favor." *California v. Brown*, 479 U.S. 538, 542 (1987). Standardless consideration of mitigating evidence "invites a return to the pre-*Furman* days when the death penalty was generally reserved for those whom society has least consideration." *Lockett*, 438 U.S. at 623 (White, J., concurring in part and dissenting in part). Indeed, such unchannelled consideration of evidence proffered in mitigation "will not guide sentencing discretion but will totally unleash it." *Lockett*, 438 U.S. at 631 (Rehnquist, J., concurring in part and dissenting in part). The consequences of such standardlessness extend beyond the "cases in which they occur, for when some defendants are able to avoid execution based on irrelevant criteria, there is a far graver risk in executing others." *Skipper*, 476 U.S. at 14 n.2 (Powell, J., concurring).

A plurality of this Court, recognizing the dangerousness of such unfocused consideration of mitigating evidence, recently stated:

> *Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors. . . . Given the awesome power that a sentencing jury must exer-

> cise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities.

Franklin, 108 S.Ct. at 2329.

The unanimity requirement, then, is not, as McKoy argues, an issue foreclosed by *Lockett* and *Mills*.[9] Rather, it is an issue in the confluence of the two lines of authority which form the basis of eighth amendment jurisprudence. The eighth amendment requires "replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death," *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976), and that "a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the offense." *Brown*, 479 U.S. at 544 (O'Connor, J., concurring). These two stated goals are in tension, to a degree, with each other. *Franklin*, 487 U.S. at 2330 (plurality opinion); *Brown*, 479 U.S. at 544 (O'Connor, J., concurring). *See also Lockett*, 438 U.S. at 619 (Marshall, J., concurring). Both competing interests are involved in determining the appropriateness of the North Carolina capital sentencing procedure's allocation of burdens of proof. The balance struck by North Carolina's legislature and refined by its Supreme Court is sufficiently sensitive to accommodate constitutionally both these competing interests.

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[9]It is superficially appealing to extend *Lockett's* and *Eddings'* requirement of consideration of relevant mitigating evidence into an analysis of burdens of proof. The State of North Carolina once advocated such a conclusion. *Kirkley*. Upon further reflection, however, the State recognized it misperceived the scope of *Lockett* and, accordingly, disavowed its contention in *Kirkley*. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Hensley v. United Planters' National Bank & Trust Company*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). Full consideration of evidence proffered to prove mitigation and the evidentiary burdens of proof necessary to prove the existence of mitigating factors are two entirely different issues.

D. Burdens of Proof May Be Placed on a Defendant to Prove the Existence of Mitigating Factors

This Court, in *Patterson v. New York*, stated

> [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by individual States. . . . [I]t is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of production of evidence and the burden of persuasion," and its decision in that regard is not subject to proscription under the due process clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."
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> * * *
>
> If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty.

432 U.S. at 201-02, 209 (citations omitted). *See also Martin v. Ohio*, 480 U.S. 228, 233–34 (1987); *Leland v. Oregon*, 343 U.S. 790, 798 (1952). There is nothing about a capital sentencing hearing that should cause this Court to construe *Lockett* or *Mills* as mandating an exception to the generally accepted principle espoused in *Patterson*, *Martin*, and *Leland* concerning the state's prerogative to assign a burden of persuasion to a defendant.

In *Lockett* and *Bell v. Ohio*, 438 U.S. 637 (1978), this Court left unanswered the issue of the propriety of the state's placing a burden of persuasion as to mitigating factors on the defendant. However, even the petitioner in *Lockett* recognized that where there is a right to place any

evidence which arguably mitigates in front of the jury, there is no constitutional barrier to placement of a burden of proof on a defendant. Petitioner Lockett stated, "The federal constitutional question raised by this allocation of the burden of proof takes shape within the framework of the particular Ohio death-sentencing process as a whole. Unlike many other States, Ohio does not have an open-ended roster of 'mitigating circumstance' [sic] as to which convenience might dictate that the burden of going forward (or even perhaps the burden of persuasion) should be cast upon a defendant who is on trial for his life." *Lockett*, Petitioner's Brief at 88. Likewise, individual justices of this Court have stated, either explicitly or implicitly, that evidentiary burdens to prove mitigation may be placed on the defendant. "There can be no infirmity in shifting the burden of persuasion to the defendant." *Lockett*, 438 U.S. at 633 (Rehnquist, J., concurring in part and dissenting in part); "'Evidence in mitigation' must rise to a certain level of persuasiveness before it can be said to constitute a 'mitigating circumstance.'" *Eddings*, 455 U.S. at 112 (Burger, C. J., dissenting); *but see Stebbing v. Maryland*, 469 U.S. 900, 902–03 (1984) (Marshall, J., dissenting from denial of *certiorari*).

A sentencing hearing is similar to a trial in many ways. *Strickland v. Washington*, 466 U.S. 668 (1984); *Bullington*. Jurors engage in much the same type of line drawing which a jury does during a guilt stage of a proceeding. *Proffitt v. Florida*, 428 U.S. 242, 257 (1976). There is nothing about the nature of mitigating evidence or finding mitigating factors which precludes placing an affirmative burden as to their existence on a defendant. As stated in *Proffitt:*

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a fact finder in a law suit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the . . . mitigating circumstances.

428 U.S. at 257–58.

Historically, defendants have borne the burden of proving mitigation. "All . . . circumstances of justification, excuse, or alleviation rested on the defendant." 4 W. Blackstone's Commentaries 201 (1803 First Ed., Reprinted 1969). Since *Furman*, many states have placed burdens of proof on defendants to prove mitigation in capital sentencing hearings.[10] This Court's cases "have insisted that the channelling and limiting of the sentencer's discretion . . . is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 487 U.S. ___, 108 S.Ct. 1853, 1858 (1988). This goal is furthered by states' placing evidentiary burdens on the defendant to prove proffered mitigating circumstances to a reasonable degree of certainty.

As the Supreme Court of North Carolina's opinion in *Kirkley* reveals, the requirement in North Carolina that a mitigating factor must be found to exist unanimously before it may be used in the balancing process is nothing more than the state's placing upon a defendant an evidentiary burden to prove his claimed mitigation to the jury by reliable evidence. That the burden of proof includes a unanimity requirement does not render it offensive to due

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[10]Various states by statute or case law explicitly place upon a defendant a burden to prove evidence in mitigation by a preponderance of the evidence. *E.g.*, Arizona, *State v. Rossi*, 741 P.2d 1223 (Ariz. 1987); Maryland, Art. 27 § 413(g) (1987 Rep. Vol.) (1975); North Carolina, *State v. Johnson*, *supra*; Pennsylvania, 42 Pa. Const. Stat. § 9711(c)(1)(iii); Connecticut, Conn. Gen. Stat. §53a-46(a) (West 1977). In Florida, jurors are instructed that defendant has established a mitigating circumstance if the jurors are "reasonably convinced [it] exists." Fla. Std. Jury Instr. (Crim) §F.S. 921.141(6) (1985).

process. With twelve-person juries, the issue of unanimity or nonunanimity is an issue left to the states. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). There is nothing inherently offensive to "some principle of justice so rooted in the traditions or conscience of our people . . ." *Patterson*, 432 U. S. at 202, in requiring a party to prove unanimously a subsidiary issue in a sentencing hearing before it can be used to balance against other similarly found subsidiary issues.

Majority verdicts on guilt or innocence are constitutionally permissible with twelve-person juries. *Johnson v. Louisiana; Apodaca*. Such decisions are far more fundamental than a factual finding that forms a subpart of a sentencing recommendation. The advisory jury recommendation as to life or death in some states need only be by a majority recommendation. *See:* Fla. Stat. Ann. § 921.141(3) (1985); Ala. Code § 13A-5-46(f) (1982); *cf.* Tex. Code Crim. Proc. Ann., art. § 37.071(d)(2) (Vernon 1981) (While twelve jurors must agree that one of the three issues exists, only ten jurors are required to find it does not exist). In Connecticut, the capital sentencing decision by a three-judge panel need not be unanimous. Conn. Gen. Stat. Ann. 53a-45(b)(West 1977). If it is constitutional for states to permit an ultimate decision such as a verdict of guilty or recommendation of death to stand even where all the jurors or judges do not agree with that decision, it is within the prerogative of the state to deem a burden of proof not reached if the existence of a factor is not unanimously agreed upon by the jury. In *Patterson* this Court stated: "If the State . . . chooses to recognize a factor that mitigates the degree of criminality or punishment . . . the State may assure itself that the fact has been established with reasonable certainty." 432 U.S. at 209. The unanimity burden guarantees that any factors utilized, aggravating as well as mitigating, are established with reasonable certainty. This policy choice by the State of North Carolina furthers the goal of providing the jury

with some framework for discharging its responsibilities. It channels sentencing discretion with clear and specific guidance which makes the process rationally reviewable. *Godfrey*, 446 U.S. at 428.

The burden of persuasion placed upon a defendant by North Carolina is arguably different from burdens of proof imposed upon defendants in capital cases by some other states. These differences do not undermine the validity of North Carolina's policy choice. *Martin; Leland*. This Court has made clear several times that, "we are unwilling to say that there is any one right way for a State to set up its capital punishment scheme." *Spaziano v. Florida*, 468 U.S. 447, 464 (1984); *Cabana v. Bullock*, 474 U.S. 376 (1986); *Baldwin v. Alabama*, 472 U.S. 372 (1985); *Pulley v. Harris*, 465 U.S. 37 (1984).

In the context of the North Carolina sentencing statute, a burden of persuasion which requires unanimity does not create a risk such as the one identified in *Mills*—that the unanimity burden of proof could transform the sentencing structure into an arbitrary one which would mandate a death sentence despite the wishes of the majority of the jury. While evidence not found unanimously to support a mitigating factor could not be used in steps three and four —just as evidence not found to support aggravating factors could not be used—the absence of this evidence would not automatically force a death verdict. North Carolina's procedure offends neither the eighth amendment nor fourteenth amendment notions of due process by conditioning continued relevancy of evidence proffered in mitigation on a defendant's meeting this unanimity burden of proof.

E. Unanimity Is Sound Public Policy

The Constitution of North Carolina requires unanimity

in jury verdicts in criminal cases. N.C. Const., article I § 24. Consistent with this command, the legislature provided that any capital sentence recommendation by a jury be unanimous. N.C. Gen. Stat. § 15A-2000(b) (1983). Beyond the constitutional and statutory bases for unanimity in the sub-issues, there are sound policy reasons to require a unanimous determination of both aggravating and mitigating factors.

Eighth amendment jurisprudence shows a repeated concern for accuracy in evidence used by the sentencer. *Johnson v. Mississippi*, 486 U.S. ___, 108 S.Ct. 1981 (1988); *Gardner*. The need for such accuracy is no less compelling because the evidence is proffered in mitigation as opposed to aggravation. The unanimity requirement for finding the existence of both aggravating and mitigating factors best ensures that only reliable information is used in the sentencing determination. In the context of North Carolina's narrowly drawn sentencing statute, failure to enforce such binding evidentiary standards would permit individual jurors to employ whimsical and speculative evidence in balancing against statutorily limited aggravating factors which must be found to exist unanimously and beyond a reasonable doubt. One end of the sentencing equation would be capable of being weighted with inaccurate or unreliable information, or even caprice or emotion. Such a result frustrates completely any attempt by North Carolina to have the recommendation reflect the use of objective, reviewable standards. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358. The unanimity requirement, which limits sentencing considerations to accurate information in mitigation as well as aggravation, serves this function.

The purpose of a jury is to "promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community." *Burch v. Louisiana*, 441 U.S. 130, 133 (1979). Each of these integral reasons for having the jury as the trier of fact at the guilt stage is equally compelling for capital sentencing. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968); *Spaziano*. The unanimity requirement promotes each of these purposes. Group deliberation is enhanced by the requirement that the jury agree unanimously on factors both in aggravation and mitigation. It is the discussion and debate over the existence of these factors which force the jury to examine the evidence in light of all the jurors' experiences and backgrounds. "The forensic process of forcing jurors to defend their conflicting recollections and conclusions flushes out many nuances which otherwise would go overlooked." *Johnson v. Louisiana*, 406 U.S. at 389 (1972) (Douglas, J., dissenting). This debate aids the jury in assigning to the factors the value necessary to make each factor found a reliable component in the guided, yet individualized, inquiry into a defendant's moral culpability as required by the eighth amendment. Informing each juror that he may consider whatever he desires in mitigation, notwithstanding the view of his fellow jurors, subverts the intensive group deliberation required to achieve a reliable sentencing decision. A requirement that findings in mitigation as well as aggravation be unanimous likewise insulates each juror from outside pressure since all must agree on and record each factor found to exist.

While not constitutionally required, jury sentencing in capital cases has wide acceptance among the states since "the imposition of the death penalty . . . is an expression of community outrage" and "the jury serves as the voice of the community." *Spaziano*, 468 U.S. at 461. Requiring unanimity causes the community's cross-section—the

jury—based on the jurors' varied backgrounds, to conclude that evidence presented by the defendant is sufficiently credible in the community's view to support the existence of a mitigating factor. This requirement for common acceptance by the jurors of a mitigating factor suggested by a defendant enhances rationality in sentencing. Failing to require unanimity would harm the value of the jury as a representative cross-section of the community in sentencing. Each juror would be free to exercise his own unfettered views as to what mitigates as opposed to being bound to consider only those circumstances which the jury—and by analogy the society it represents—all agree lessens the moral culpability of an individual for a crime. Rather than reflecting a reliable understanding of what society's voice believes to be mitigating, judgments where unanimity is not required would be susceptible to individual whim and caprice.

Not only does unanimity in finding mitigating factors work to promote the reliability of the jury's deliberative process, it also "ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process." *Brown*, 479 U.S. at 543; *Harris*. North Carolina's proportionality review is a part of its mandatory appellate review of capital cases. N.C. Gen. Stat. § 15A-2000(d)(2) (1983). The cases against which a capital case is compared are those in which a capital sentencing hearing was held. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865 (1983). The Supreme Court of North Carolina "'compare[s] the case at bar to other cases in the pool that are roughly similar with regard to the crime and defendant. . . .' For this purpose the manner in which the crime was committed and the defendant's character, background, and physical and mental condition are relevant considerations." *State v. Brown*, 320 N.C. 179, 220, 358 S.E.2d 1, 27 (citation omitted), *cert. denied*, ___ U.S. ___, 108 S.Ct. 467 (1987). This review will be hampered if the court is

deprived of information concerning which mitigating factors the jury employed in making the ultimate life or death decisions. Both during the sentencing hearing and during appellate review of the sentence, the reliability of North Carolina's procedure is enhanced by requiring unanimity of findings in mitigating as well as aggravating factors.

F. The Unanimity Requirement Does Not Provide Each Juror A "Blackball" And Thus Threaten Reliability Of The Recommendation.

Throughout his brief McKoy has employed the crude and emotionally laden term "blackball" to describe North Carolina's unanimity requirement. Use of this term mischaracterizes North Carolina's procedure. North Carolina's system can no more be described as a "blackball" system than can that of Florida or Indiana where one judge can override the considered opinions of up to twelve other persons. *Dobbert v. Florida*, 432 U.S. 282 (1977). A judge in Florida or Indiana can override the wishes of the advisory jury only pursuant to strict standards. *Tedder v. State*, 322 So.2d 908 (Fla. 1975); Ind. Code § 35-50-2-9(d) (Burns 1977). In North Carolina, a juror is not permitted to reject evidence except pursuant to clear standards relating to credibility or burdens of persuasion. Thus, neither system can be referred to as employing a "blackball" since that term connotes unprincipled, arbitrary, prejudiced action by one to deny a right or privilege. The North Carolina system is geared towards ensuring responsible action. As this Court recognized in *Caldwell v. Mississippi*, 472 U.S. 320 (1985):

> Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. . . . The sentencing scheme's premise

> . . . [is] . . . "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision". . . . Belief in the truth of this assumption . . . has allowed this Court to view sentencer discretion as consistent with—and indeed indispensible to—the Eighth Amendment's "need for reliability. . . ."

472 U.S. at 329–30 (citations omitted). There is no need to rely simply on this presumption in a vacuum. As Justice Powell, concurring in *Johnson v. Louisiana*, noted in another context:

> [Each state] has at its disposal protective devices to diminish significantly the prospect of jury irresponsibility. Even before the jury is sworn, substantial protection against the selection of a representative but wilfully irresponsible jury is assured by the wide availability of peremptory challenges and challenges for cause. The likelihood of miscarriage of justice is further diminished by the judge's use of full jury instructions, detailing the applicable burdens of proof, informing the jurors of their duty to weigh the views of fellow jurors, and reminding them of the solemn responsibility imposed by their oaths.

406 U.S. at 379–80 (Powell, J., concurring).

North Carolina provides a capital defendant with fourteen peremptory challenges. N.C. Gen. Stat. § 15A-1217 (1983). *Voir dire* questioning is generally quite liberal to assure responsible use of challenges. *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *modified as to death penalty*, 428 U.S. 902 (1976). A capital defendant accused of an interracial murder is entitled to have prospective jurors questioned on the issue of racial bias.

Turner v. Murray, 476 U.S. 28 (1986). The State may not employ its peremptory challenges in a racially discriminatory manner. *Batson v. Kentucky*, 476 U.S. 79 (1986). Jurors who cannot consider a sentence of death are removable for cause. N.C. Gen. Stat. § 15A-1212 (1983); *Wainwright v. Witt*, 469 U.S. 412 (1985). So are jurors who cannot consider a sentence of life. *Ross v. Oklahoma*, 487 U.S. ___, 108 S.Ct. 2273 (1988). Thus, jury selection removes those persons unable to accept concepts of mitigation or the instructions of the court. North Carolina's capital sentencing instructions and issue forms are detailed and specifically tailored to each case (see J.A. 4–26). These instructions give full explanations of both credibility evaluations and burdens of proof. The jury is often told (and indeed was told in this case) of its duty to consult with and listen to fellow jurors while deliberating (J.A. 21). N.C. Gen. Stat. § 15A-1235 (1983). After the jury returns its sentencing recommendation, the jury must be individually polled to establish that each juror concurs and agrees to the sentence recommendation returned. N.C. Gen. Stat. § 15A-2000(b) (1983). Therefore, North Carolina's process—from jury selection to jury poll—ensures rational and reliable decision making.

The findings by the jury in this case fail to support McKoy's speculation as to possible arbitrary action. McKoy asserts "[b]ecause the jury failed to achieve unanimity as to these circumstances, it was prohibited from considering any of the substantial evidence relating to the circumstances in deciding whether Dock McKoy should live or die." (Brief at 27–28) This is gross speculation. The transcript fails to reveal any juror disagreement as to factors found or not found. If anything, the jury's findings in mitigation flow almost inevitably from the prior unanimous guilt phase determinations rejecting the insanity defense and convicting McKoy of premeditated murder.

The unfound circumstances "that the capital felony was

committed while the defendant was under the influence of mental or emotional disturbance," "that for several decades Dock McCoy has exhibited signs of mental or emotional disturbance or defect that went untreated," "that Dock McCoy's mental and emotional disturbance is aggravated by his poor physical health," and "Dock McCoy's ability to remember the events of December 22, 1984 is actually impaired" are dependent upon the testimony of Dr. Rollins, a psychiatrist who examined McKoy six months after the murder (T. 890). The jury, at the guilt phase of this trial, unanimously rejected Dr. Rollins' opinions by repudiating the insanity defense which was based on his testimony. The evidence to support the aforementioned factors depended almostly entirely on Dr. Rollins' opinions formed during his examination of McKoy. No more than a *de minimus* nexus was established between the claimed chronic personality disorders testified to by Dr. Rollins and McKoy's state of mind during the murder. Dr. Lara, the other consulting psychiatrist, testified that McKoy had a personality disorder but did not specifically link that disorder to a claim that McKoy committed the murder while under the influence of a mental or emotional disturbance.

McKoy introduced no supporting evidence to bolster Dr. Rollins' assertions beyond some opinion testimony by Dr. Lara. Much of the lay testimony in this case disputes the psychiatrists' opinions. For instance, although in Dr. Rollins' opinion McKoy's memory of the events was actually impaired, Dr. Lara's opinion was, at best, equivocal. The testimony of the officers who took McKoy's confession as well as that of the emergency room physician directly contradicted Dr. Rollins' opinion of McKoy's alleged memory impairment. Likewise, no evidence from McKoy's neighbors or the officers supported the opinion of the psychiatrist that McKoy was emotionally disturbed at the time of the offense as opposed to merely drunk and

belligerent. In fact, the evidence revealed McKoy had held a job with no problems and had proven to be a dependable worker for nearly four years.

The jury also failed to find McKoy's age as mitigating. This hardly indicates jury arbitrariness. There was no showing that McKoy's age reflected a lessened moral culpability, especially when viewed from the perspective of his apparent refusal to learn from his past experiences of incarceration following prior assaultive and murderous actions.

The two factors found by the jury were supported by evidence in addition to mere opinions formed months after the murder. The jury found impairment of McKoy's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law and also that McKoy had a low level of intellectural functioning. Both Dr. Lara and Dr. Rollins testified these conditions were present. Significantly, these opinions were bolstered either by concrete evidence such as test scores on IQ tests or by testimony from persons who had observed McKoy's behavior on the day of the crime.

The jury in this case spent at least four hours over a two-day period deliberating the appropriate penalty in this case (J.A. 17–22). The jury unanimously assented to that recommendation when polled. The findings reflect the jury found all things proffered in mitigation supported by something besides a psychiatrist's opinion. Thus, far from showing that the findings in mitigation were the probable result of failures to agree, the findings show the kind of line drawing expected from a jury which takes its responsibilities seriously and looks to those things reliably proven upon which to base a sentencing recommendation.

CONCLUSION

McKoy asks this Court to expand *Mills* to invalidate North Carolina's prerogative to place a reasonable burden of persuasion on a defendant to prove mitigating factors to the satisfaction of the entire jury. The result of such a holding on a sentencing system such as North Carolina's will be to infect one side of a finely drawn balancing equation with absolute, unfettered discretion. To hold such unbridled discretion constitutionally mandated will return this Court to the pre-*Furman* era since this Court will be requiring, as a matter of constitutional law, albeit as to a narrowed group of defendants, the very unguided juror discretion which *Furman* justly condemned. North Carolina has used its burden of proof to reconcile the two competing principles of eighth amendment jurisprudence —individualized consideration and objective, rationally reviewable standards—through the structuring of its issues and burdens of proof. This Court should not interpret *Mills* to invalidate this system. The judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

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RE: McKoy v. North Carolina
No. 88-5909

Dear Mr. Spaniol:

Enclosed please find the manuscript copy of the Reply Brief for the Petitioner and my Certificate of Service in the above-named case.

Thank you.

Sincerely,

Malcolm Ray Hunter

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MRHjr.:jb

cc: Ms. Joan H. Byers

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-5909

DOCK McKOY, JR.,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Malcolm Ray Hunter, Jr., a member of the bar of this Court hereby certify that on July 15, 1989, one copy of the Reply Brief for Petitioner was mailed, first-class postage prepaid, to: Joan H. Byers, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, Attorney for Respondent. I further certify that all parties required to be served have been served.

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IN THE SUPREME COURT OF THE UNITED STATES

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DOCK McKOY, JR.,

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NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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ARGUMENT

A. THE DECISION IN MILLS CONTROLS THIS CASE.

Respondent's entire brief rests upon a false interpretation of *Mills v. Maryland*, 486 U.S. ___, 100 L.Ed.2d 384 (1988). According to the respondent:

> The concern in *Mills* was not whether Maryland could, consistent with the eighth amendment, require unanimity as to the finding of mitigating factors. Rather, *Mills* involved possible ambiguity in instructions concerning the further use and consideration of evidence conceded to be relevant under Maryland law.

(Brief for Respondent at 16). Thus, says the respondent, "[i]t is the absence of ambiguity in the sentencing instructions that renders *Mills* not controlling in this case." *Id.* at 17.

This construction of *Mills* ignores "the rationale of the *Mills* decision as expressed by the opinion itself." J.A. 83, *State v. McKoy*, 323 N.C. 1, 51, 372 S.E.2d 12, 43 (1988) (Exum, C.J., dissenting). The majority opinion in *Mills* begins its analysis by setting out two "intuitively disturbing" hypothetical situations, in each of which the jury's consideration of mitigating evidence is foreclosed by the failure of all twelve jurors to agree in finding any particular mitigating circumstances. 100 L.Ed.2d at 393. These situations are used to illustrate the fundamental constitutional vice of a capital sentencing procedure in which "a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the sentence of death." 100 L.Ed.2d at 394. Stressing that "it would certainly be the height of arbitrariness to allow or require the imposition of the death

penalty under [these conditions]," 100 L.Ed.2d at 393, the Court concludes that "if the [*Mills*] petitioner's interpretation of the sentencing process (used in his case) is correct, " 'the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett* [*v. Ohio*, 438 U.S. 586 (1978), and makes] it . . . our duty to remand this case for resentencing.' " 100 L.Ed.2d at 394, *quoting Eddings v. Oklahoma*, 455 U.S. 104, 117 n.* (1982) (O'Connor, J., concurring).

It is at this point, and only at this point, in the *Mills* Court's analysis that the ambiguity of the jury instructions and the verdict form in *Mills* is taken up. The reason for taking it up, as the Court explains, is to resolve "[t]he critical question . . . whether petitioner's interpretation of the sentencing process [just described and found to entail a "plain violation of *Lockett*"] is one a reasonable jury could have drawn from the instructions . . . and . . the verdict form." 100 L.Ed.2d at 394. Thus, the instructional ambiguity in *Mills* was not -- as the respondent now contends -- any part of the source of the constitutional violation condemned in that case. The instructional ambiguity was pertinent only to the secondary inquiry whether Mills' death sentence could be *saved* from invalidation under *Lockett* by the existence of an alternative possible interpretation of Mills' jury instructions and verdict form. The *Mills* opinion simply could not be clearer on this point. It says in plain words that:

> If the jury understood the verdict form as the [Maryland] Court of Appeals asserted it should have, then every time it marked 'no' beside a mitigating circumstance it indicated its unanimous conclusion that petitioner [Mills] had not proved the mitigating facts by a preponderance of the evidence, and thus . . . [no *Lockett* violation occurred]. On the other hand, if the jury understood that it should mark 'no' when it failed to agree unanimously that a mitigating circumstance existed, then some jurors were prevented from considering 'factors which may call for a less severe penalty,'

> *Lockett v. Ohio*, 438 U.S. at 605, and petitioner's sentence cannot stand.

100 L.Ed.2d at 395.

Respondent's torturous effort to rewrite *Mills* as a case of unconstitutionally ambiguous jury instructions is particularly indefensible for two reasons:

First, far from distinguishing *Mills*, "the absence of ambiguity in the sentencing instructions [in the present *McKoy* case]" (Brief for Respondent at 17) simply eliminates the ground of the 5-to-4 division of the Court in *Mills*. Chief Justice Rehnquist's dissenting opinion in *Mills* did not take issue with the majority's conclusion that *Lockett v. Ohio* -- along with *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986), and *Hitchcock v. Dugger*, 481 U.S. ___, 95 L.Ed.2d 347 (1987) -- condemned a capital sentencing procedure in which "a single juror's holdout vote against finding the presence of a mitigating circumstance" precluded the entire jury from considering that circumstance in mitigation. *Mills*, 100 L.Ed.2d at 394. The Chief Justice disagreed only with the *Mills* Court's answer to the "question . . . whether a reasonable juror operating under the trial court's instructions would have considered [Mills'] . . . evidence of mitigating circumstances *in a constitutional manner*" -- that is, whether "a reasonable juror [would] understand that, to mark 'no' to each mitigating factor on the sentencing form, all twelve jurors must agree." 100 L.Ed.2d at 406 (Rehnquist, C.J., dissenting) (emphasis added). Since the respondent here concedes that the instruction in *McKoy* unambiguously forbade the entire jury to give any sentencing consideration whatsoever to mitigating evidence found sufficient to establish a particular mitigating factor by eleven but not all twelve jurors (even though the twelfth juror might have found *another* mitigating factor whose consideration was *also* precluded by the lack of jury unanimity as to that factor, and might have concurred with

the other eleven jurors in thinking that McKoy deserved to live), the respondent's emphasis upon the "nonambiguity" of the *McKoy* instructions deprives the respondent even of the support of the dissenting opinion in *Mills*.

Second, respondent's interpretation of *Mills* makes that case stand for a sweeping proposition that North Carolina (and every other State that uses the death penalty) would surely leap to disavow as soon as it is critically examined. According to the respondent, Maryland was constitutionally permitted in *Mills* either to allow or to forbid a single juror's holdout vote to preclude the jury from considering mitigation, but, because the *Mills* jury instructions were ambiguous as to which of these two, equally constitutional procedures the jury should follow, Mills' death sentence was unconstitutional. Thus, unclarity concerning mere state-law issues in capital sentencing instructions (and, by the same token, any unclarity concerning mere state-law issues in the guilt-phase instructions at a capital trial, *see Beck v. Alabama*, 447 U.S. 625 (1980)), would be subject to federal constitutional review and invalidation. Despite the settled rule that *errors* of state law do not, as such, rise to federal constitutional dimension, *see Barclay v. Florida*, 463 U.S. 939 (1983), *ambiguity* as to whether errors of state law have occurred make a state court's judgment of death federally unconstitutional.

Obviously, this is not what *Mills* holds. *Mills* holds what it says it holds: that "if the [*Mills*] jury understood that it should mark 'no' when it failed to agree unanimously that a mitigating circumstance existed, then some jurors were [unconstitutionally] prevented from considering 'factors which may call for a less severe penalty.' " 100 L.Ed.2d at 395, *quoting Lockett*, 438 U.S. at 605. *Mills* accordingly controls here and, to paraphrase Justice White's concurring opinion in *South Carolina v. Gathers*, ___ U.S. ___, 57 U.S.L.W. 4629, 4631 (June 12, 1989): "Unless . . . [*Mills*] is to be overruled, the judgment below must be . . . [reversed]."

B. MITIGATING EVIDENCE MAY NOT CONSTITUTIONALLY BE DECLARED "IRRELEVANT" SIMPLY BECAUSE A SINGLE HOLDOUT JUROR FAILS TO FIND THE MITIGATING FACTOR THAT THE EVIDENCE IS OFFERED TO PROVE.

Respondent similarly ignores the commands of both precedent and reason in its attempt to distinguish *Mills* on the ground that under North Carolina law, "[e]vidence insufficiently reliable to convince the entire jury of the existence of a mitigating factor becomes, in effect, legally irrelevant for further use in the sentencing proceeding." (Brief for Respondent at 20-21) If, as the respondent urges, a state-law "finding that evidence is irrelevant for further use in a sentencing process need not be specifically denominated 'legally irrelevant' when that is the result of the decision" (*id.* at 21 n.6), then the holding of the Supreme Court of South Carolina in *Skipper v. South Carolina*, 476 U.S. 1 (1986), was unmistakably that Skipper's good behavior in jail was "legally irrelevant" in mitigation under South Carolina's death-sentence procedure; and the holding of the Texas Court of Criminal Appeals in Johnny Paul Penry's case was unmistakably that Penry's mental retardation was "legally irrelevant" in mitigation under Texas' death-sentencing procedure except insofar as it went "to the question whether he was capable of acting 'deliberately,' " *Penry v. Lynaugh*, ___ U.S. ___, 57 U.S.L.W. 4958, 4963 (June 26, 1989). Skipper's and Penry's death sentences were, of course, invalidated by this Court precisely because the state courts had precluded their sentencers' consideration of this "legally irrelevant" mitigating evidence. Indeed, Sandra Lockett's mitigating evidence was legally irrelevant under Ohio law except insofar as it went to the three specific mitigating circumstances enumerated by the governing Ohio death penalty statute; and that, again, was why the Ohio statute created an unconstitutional "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605.

Respondent contends that:

> *Skipper v. South Carolina*, 476 U.S. 1 (1986) does not preclude . . . [the North Carolina Supreme Court's] relevancy determination [that "[i]f all jurors do not agree on a specific mitigating circumstance, then the defendant has failed to meet his or her burden of proof on that circumstance and the evidence regarding it is not legally relevant for sentencing purposes"]. In *Skipper*, this Court held that a state could not declare as irrelevant and substantively inadmissible categories of evidence which arguably support a basis for a sentence less than death. The relevancy determination required here is of an entirely different character. It involves the continued viability of evidence which failed to survive a traditional burden of proof standard.

(Brief for Respondent at 21-22). This argument, attempting to distinguish a *substantive* state-law determination of irrelevancy from a *procedural* state-law determination of irrelevancy, fails for three independently sufficient reasons.

First, under the procedure used to impose petitioner's death sentence, a single juror's failure to join his or her eleven compeers in finding a particular mitigating circumstance did not have to be based at all on a determination that the mitigating circumstance was factually unproved. It could be based instead on the determination that, in this one juror's view, the circumstance offered by the petitioner was factually proved but was not substantively mitigating. The jury instructions below explicitly required the jurors to find not only the factual existence of each nonstatutory mitigating circumstance but also whether that circumstance *was mitigating*. J.A. 11-13. The jurors were instructed to make the same determination with regard to the catch-all statutory mitigating circumstance and the statutory mitigating circumstance of the defendant's age. *Id.* Thus, if a single juror thought that any of these circumstances, although amply proved in fact, was *not mitigating*, his or her conclusion to that effect would compel the

entire jury to give "no weight at all" to the circumstances.[1] *Penry*, 57 U.S.L.W. at 4972 (Scalia, J., dissenting). As the respondent readily concedes, a circumstance blackballed by one of twelve jurors in this fashion[2] simply "cannot be used during the final weighing and balancing steps of . . . [the North Carolina] death penalty sentencing procedure." (Brief for Respondent at 19) The real difference between the preclusion of mitigating evidence prohibited by this Court in *Skipper* and the preclusion of mitigating evidence permitted by the court below is that in Skipper's case the preclusion occurred in open court, on the record, pursuant to the rule of law, and subject to appellate review, whereas in McKoy's case the preclusion was authorized to be made by a lone holdout juror operating in the secrecy of the jury room, for undisclosed and unreviewable reasons. That difference lends no constitutional credentials to McKoy's death sentence.

---

1 Respondent implies that *voir dire* examination of prospective jurors can alleviate the possibility of empaneling a juror who would preclude consideration of categories of mitigating evidence. Brief for Respondent at 40, citing *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *modified as to death penalty*, 428 U.S. 902 (1976). However, inasmuch as this Court has repeatedly held that unconstitutional jury instructions cannot be saved by the arguments of counsel, *see, e.g., Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978); *Carter v. Kentucky*, 450 U.S. 288, 304 (1981), it follows *a fortiori* that instructions restricting the consideration of mitigating evidence in violation of *Lockett* cannot be saved by the possibility of adroit *voir dire* examination by defense counsel. Moreover, it is well settled under North Carolina law that the extent of *voir dire* is left to the discretion of the trial judge, *e.g., State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988) (reversal of the trial judge is warranted only upon a showing that his or her rulings are so arbitrary that they could not have been the result of a reasoned decision), and many trial judges severely limit defense counsel's *voir dire* questioning of prospective jurors, *see, e.g., State v. Johnson*, 317 N.C. 343, 382-83, 346 S.E.2d 596, 618 (1986) (trial court did not abuse its discretion in refusing to allow defense counsel to ask prospective jurors whether they would take evidence of child abuse and parental neglect into consideration in the sentencing process); *State v. Allen, supra*, 322 N.C. at 189-91, 367 S.E.2d at 634 (trial court did not abuse its discretion in refusing to allow defense counsel to ask whether a prospective juror believed that a person can be so mentally ill as to be incapable of knowing the nature of his act, or to ask whether a prospective juror believed that a person could never have a mental condition so severe as to prevent him from knowing right from wrong). Thus, North Carolina *voir dire* practice manifestly does *not* guarantee that no juror can be empaneled who, on the basis of his or her personal beliefs, may preclude the entire jury's consideration of categories of pertinent mitigating evidence.

2 Under North Carolina practice, the jury must be unanimous only to find a mitigating circumstance, not to reject a mitigating circumstance. A single juror's vote suffices to reject any mitigating circumstance and thereby to preclude the entire jury's consideration of the evidence going to show that circumstance. Thus, in exactly the same way that any fraternity member can exclude a pledge from the fraternity by one blackball vote, any single juror can "blackball" the consideration of one or more mitigating circumstances. "Blackball" is not, as respondent suggests, "a crude and emotionally laden term" (Brief for Respondent at 39); it is an apt one.

Second, respondent's attempted distinction between *substantive* preclusion of mitigation in *Skipper* and *procedural* preclusion of mitigation in the present case assumes that a State has greater power to erect procedural barriers to the consideration of defensive evidence than to shape the substantive content of its criminal law. Precisely the converse is true, of course -- in regard to both guilt and punishment. *Compare Powell v. Texas*, 392 U.S. 514 (1968) *with Chambers v. Mississippi*, 410 U.S. 284 (1973), *and Olden v. Kentucky*, ___ U.S. ___, 102 L.Ed.2d 513 (1988) (*per curiam*); *compare Barefoot v. Estelle*, 463 U.S. 880 (1983) *with Green v. Georgia*, 442 U.S. 95 (1979) (*per curiam*).

Third, the precise form of procedural preclusion involved in the present case was examined and held unconstitutional in *Mills*. In overturning Ralph Mills' death sentence, the Court said:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio*, . . . ; *Hitchcock v. Dugger*, . . . ; by the sentencing court, *Eddings v. Oklahoma*, . . . ; or by an evidentiary ruling, *Skipper v. South Carolina*, ... The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, . . . the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.' *Eddings v. Oklahoma*, 455 U.S. at 117 n* (O'Connor, J., concurring).

100 L.Ed.2d at 394.[3]

[3] Contrary to respondent's submission (Brief for Respondent at 18-19, 20-21) and to the reasoning of the majority of the North Carolina Supreme Court below (J.A. 71, 323 N.C. at 40-41, 372 S.E.2d at 33), footnote 7 of the *Mills* opinion does not authorize a state court to avoid this result by the facile expedient of labeling mitigating evidence "not legally relevant" whenever a single juror fails to find the mitigating circumstance that the evidence is offered to prove. Footnote 7 says that, "no one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered 'irrelevant' by one holdout vote." Far from implying that such an argument would succeed if made, the footnote implies that the argument is too extravagant to make. And so it is, of course. Except in an effort to transmute footnote 7 into a loophole in *Mills*, no lawyer versed in Anglo-American evidentiary traditions would ever think of using the word "irrelevant" to describe "evidence which [has] failed to survive a traditional burden of proof standard." (Brief for Respondent at 22) A burden of proof is concerned with "impress[ing] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue," *In re Winship*, 397 U.S. 358, 364 (1970); it has to do with the sufficiency of evidence, not with the admissibility or relevance of evidence. When the prosecutor presents eyewitness testimony identifying a defendant as the perpetrator of a crime but this evidence fails to convince the jury beyond a reasonable doubt, the evidence is not thereby retrospectively rendered "irrelevant" in ordinary legal parlance; it is simply insufficient to convict. When a defendant testifies that he was forced at gunpoint to participate in a robbery but the jury does not believe him, his testimony does not thereby become "irrelevant" to the defense of duress; it was simply unconvincing or unpersuasive or insufficient to make out the defense. "Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy" in any conventional sense of the word "relevancy," as Chief Justice Exum pointed out below. J.A. 88, 323 N.C. at 55-56, 372 S.E.2d at 45 (dissenting opinion). It is for this reason that respondent can take no comfort in the observation that "[t]he cases in which this Court has addressed issues concerning the introduction and consideration of a defendant's evidence proffered in mitigation have consistently referred to 'relevant mitigating evidence.' " (Brief for Respondent at 21) "Relevant," as this Court has used the term, describes " 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Eddings v. Oklahoma*, *supra*, 455 U.S. at 110, *quoting Lockett v. Ohio*, *supra*, 438 U.S. at 604. As the *Eddings* opinion is at pains to point out, it has nothing whatsoever to do with whether the sentencer is persuaded or unpersuaded by the evidence.

C. THERE IS NO CONSTITUTIONALLY ACCEPTABLE JUSTIFICATION FOR PERMITTING A SINGLE JUROR TO PRECLUDE THE ENTIRE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES.

Relitigating *Mills*, respondent offers several purported justifications for permitting "a single juror's holdout vote against finding the presence of a mitigating circumstance" to preclude consideration of the underlying mitigating evidence by the whole jury. All fail.

Respondent first says that the single juror blackball is merely North Carolina's way of "placing a burden of persuasion as to mitigating factors on the defendant." (Brief for Respondent at 31; *see id.* at 31-35) We have already shown at pages 6 and 7 above that this is an inaccurate description of the power given to a single juror by the instructions in petitioner's case, because those instructions permitted one juror to preclude the consideration by all twelve *not only of circumstances which a lone juror found to be factually unproved, but also of circumstances which a lone juror found to be*

factually proved but did not view as mitigating. If, for example, one juror concurred with the other eleven in finding as a fact that petitioner Dock McKoy was sixty-five years old -- as he indisputably was -- but believed, contrary to the other eleven jurors, that the age of 65 was not mitigating, the entire jury was precluded from considering McKoy's age in mitigation. And this was so even though the holdout juror on the mitigating circumstance of age believed that McKoy's life should be spared on account of some other circumstance -- such as McKoy's poor physical health -- which all twelve jurors found to be factually established but which a different holdout juror deemed not mitigating. Such a process of decisionmaking cannot be defended on the ground that "[t]he unanimity burden guarantees that any factors utilized . . . as mitigating . . . are established with reasonable certainty." (Brief for Respondent at 34)

Nor can it be defended, as respondent seeks to do, by asserting that "[t]he unanimity requirement . . . best ensures that only reliable information is used in the sentencing determination." (Brief for Respondent at 36; *see id.* at 35-39) A single juror's belief that the age of 65 is not mitigating can hardly be viewed as more "reliable" than eleven jurors' beliefs that the age of 65 *is* mitigating. It cannot be regarded as more "accurate" (Brief for Respondent at 36), more "rational[]," *id.* at 38, or more "objective," *id.* at 19. Respondent makes much of the notion that "[g]roup deliberation is enhanced by the requirement that the jury agree unanimously on factors . . . in . . . mitigation" (Brief for Respondent at 37), but fails to mention that under the strange form of unanimity requirement which it is defending, the jury is required to be unanimous only to find a mitigating circumstance, not to reject one. The traditional unanimity requirement -- under which, for example, a jury is required to be unanimous either to convict or to acquit -- does indeed promote group deliberation; but it does so by requiring that the jurors continue to debate with one another until they achieve consensus. In stark contrast, the procedure used to sentence McKoy to die permitted

any one juror to end the debate -- and to preclude the consideration of a given mitigating circumstance -- simply by refusing unilaterally to find that circumstance. A sentence so imposed does not "reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original).

Citing the plurality opinion in *Franklin v. Lynaugh*, 487 U.S. ___, ___, 101 L.Ed.2d 155, 169 (1988), to the effect that " *'Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of . . . mitigating factors' " (Brief for Respondent at 22), respondent next argues that a procedure which forbids all twelve jurors to consider any mitigation rejected by one of them is constitutional because it "simply pertains to the state ensuring that jury consideration of mitigating evidence not be undirected or unfocused, but rather channelled in an effort to achieve a rational sentencing determination." *Id.* This appears to be an argument that Justice White's plurality opinion in *Franklin* -- sixteen days after *Mills* was decided -- overruled *Mills sub silentio*, despite the facts that the *Franklin* plurality opinion does not discuss *Mills* and that Justice White concurred in *Mills*. The Court's subsequent decision in *Penry v. Lynaugh*, *supra*, squarely holds that the same Texas sentencing procedure which was before the Court in *Franklin* could not constitutionally be used to preclude consideration of Penry's evidence of mental retardation and childhood abuse in mitigation under the guise of "channelling" that evidence through Texas' three "special issues," *Penry*, 57 U.S.L.W. at 4962-65, and the dissenters in *Penry* disagreed only because they believed that this evidence "could be considered (and, of course, given effect in answering . . . [Texas' three special-issue] questions)," *id.* at 4972 (Scalia, J., dissenting). Notably, the dissenters were careful to point out that, under their view, "there remains available . . . the contention that a particular mitigating circumstance is in fact irrelevant to any of the three questions . . . [that Texas law] poses, and hence

could not be considered." *Id.* But that is exactly the situation presented here, because the North Carolina Supreme Court has upheld petitioner's death sentence on the theory that "[i]f all the jurors do not agree on the existence of a specific mitigating circumstance, then the defendant has failed to meet his or her burden of proof on that circumstance and the evidence regarding it is not legally relevant for sentencing purposes." J.A. 70, 323 N.C. at 41, 372 S.E.2d at 34. The short of it is that, as Chief Justice Exum pointed out in dissent below, "Guiding and structuring the jury's consideration of mitigating evidence is one thing; precluding the jury's consideration of such evidence at the final decisionmaking stage is quite another. . . . [The *Franklin* plurality opinion] permits the former; *Mills* prohibits the latter." J.A. 90, 323 N.C. at 56-57, 372 S.E.2d at 46.

Finally, respondent argues that "[t]he application of binding evidentiary standards" helps "to promote reliability and uniformity among cases in the jurisdiction" and is necessary to prevent a return to the "totally unguided juror discretion" condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). (Brief for Respondent at 28-29) This is not a new argument, nor a colorable one in the light of the Court's post-*Furman* case law. The Ohio statute invalidated in *Lockett* was premised on the same misunderstanding of *Furman*. *See* 438 U.S. at 599 n.7. "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating facts, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). When the Florida Supreme Court forbade the consideration of nonstatutory mitigation in *Cooper v. State*, 336 So.2d 1133 (1976), upon the explicit ground that this was necessary to prevent unguided juror discretion, *see id.* at 1139 n.7, the result was held unconstitutional by a unanimous Court in *Hitchcock v. Dugger*, 481 U.S. ___, 95 L.Ed.2d 347 (1987). Respondent's "unguided discretion" argument was most recently rejected by the Court

in *Penry v. Lynaugh*, 57 U.S.L.W. at 4964-65, and the dissenters in *Penry* disagreed with the Court only because they viewed Texas' special-issue procedure as "a desirable means of 'focus[ing] the jury's objective consideration of the particularized circumstances' . . . [so as] 'to achieve a more rational and equitable administration of the death penalty.' " *Id.* at 4973 (Scalia, J., dissenting). No similar claim can be made for a procedure which permits the idiosyncratic views of one juror as to what is proved and what is mitigating to preclude the whole jury from considering evidence in mitigation.[4]

The irony of respondent's argument is that it invokes a supposed concern "to achieve a more rational and equitable administration of the death penalty" (Brief for Respondent at 15) to defend a practice which has just the opposite result. Permitting a single juror to prevent the entire jury from giving any consideration at all to mitigating evidence -- including whole categories of mitigating evidence that the lone juror does not believe to be mitigating -- defeats, rather than advances, a rational and equitable administration of the death penalty. "In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' the jury must be able to

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[4] On this point, respondent tries to have it both ways. It praises "the value of the jury as a representative cross-section of the community in [capital] sentencing" (Brief for Respondent at 38) but analogizes North Carolina's single-juror veto to the capital sentencing procedures "of Florida or Indiana where one judge can override the considered opinion of up to twelve other persons." *Id.* at 39. The analogy is trebly flawed. *First*, the justification for *judicial* sentencing in capital cases is that it "should lead . . . to greater consistency in the imposition at the trial level of capital punishment, since a trial judge is more experienced than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion). A North Carolina holdout juror has no special sentencing experience or expertise of this sort. *Second*, in upholding the Florida judicial sentencing procedure, this Court noted that the standard of review adopted by the Florida Supreme Court was "crucial" to its constitutionality. *Dobbert v. Florida*, 432 U.S. 282, 295 (1977). Under that standard, "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Id. quoting Tedder v. State*, 322 So.2d 908, 916 (Fla. 1975). No such exacting standard controls a lone juror's blackball of mitigating evidence under North Carolina law. *Third*, under Florida and Indiana practice, the jury's sentencing recommendation does *not* foreclose the trial judge from considering evidence in mitigation; the trial judge must consider such evidence whether he or she accepts or rejects the jury's verdict.

consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." *Penry v. Lynaugh*, 57 U.S.L.W. at 4965. There is simply no support for the idea that giving a single juror the power to preclude consideration of such evidence whenever he or she disagrees with the eleven other jurors improves "the objectivity of the sentencing process." (Brief for Respondent at 28)[5] To the contrary, this procedure allows the unregulated and unexplained subjective view of one juror to set at naught the settled Eighth Amendment rule that "the sentencer must be permitted to consider all mitigating evidence." *Mills v. Maryland, supra*, 100 L.Ed.2d at 400.

[5] "[J]ury deliberations are by nature secret, and the mental processes or individual jurors equally recondite." *Mills v. Maryland, supra*, 100 L.Ed.2d at 407 (Rehnquist, C.J., dissenting).

CONCLUSION

Respondent has conceded that under the instructions given to petitioner's jury a mitigating circumstance rejected by a single juror could "[]not be used during the final weighing and balancing steps of . . . [the] death sentencing procedure." (Brief for Respondent at 19) No other State than North Carolina permits a lone juror to blackball consideration of mitigating evidence, and no legitimate rationale supports North Carolina's unusual procedure. While there is no "one right way for a State to set up its capital punishment scheme," *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), there are wrong ways. The way used by North Carolina to sentence petitioner to death was expressly held unconstitutional in *Mills*. Accordingly, Dock McKoy's death sentence must be vacated.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DOCK McKOY, JR.,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Writ of Certiorari To The Supreme Court of The State of North Carolina

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BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, CONNECTICUT, GEORGIA, IDAHO, INDIANA, KENTUCKY, MISSOURI, MISSISSIPPI, NEVADA, NEW JERSEY, NEW MEXICO, OKLAHOMA, PENNSYLVANIA, TEXAS, AND VIRGINIA

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INTEREST OF AMICI CURIAE

Amici curiae are states which have authorized the imposition of death as a possible penalty in specified homicide cases. Each state, through the enactment of its statutory scheme and the interpretation of those statutes by its state courts, has been guided by the requirements of this Court's Eighth Amendment jurisprudence that the sentencer's discretion be channeled and guided, and that the defendant be allowed to introduce relevant mitigating evidence. The states have also accepted this Court's assurance that there is no "right way for a State to set up its capital sentencing scheme." *Spaziano v. Florida*, 468 U.S.

447, 464 (1984). They have, therefore, taken different approaches to the classification of capital cases, *see Lowenfield v. Phelps*, ____U.S. ____, 108 S.Ct. 546 (1988), as well as to the procedures for determining whether death is appropriate in a particular case. *See, e.g., Zant v. Stephens*, 462 U.S. 862 (1983).

Increasingly, however, the states have found that this Court's examination of a particular statutory scheme soon translates into a defense attack on their own statutes. These arguments tend to focus on a single phrase or limited portion of the Court's opinion, taken out of context, and occur whether there are differences or similarities between the provision being reviewed and their own. The interpretation of *Mills v. Maryland*, ___ U.S. ___, 108 S.Ct. 1860 (1988) by Petitioner McKoy illustrates the point.

SUMMARY OF ARGUMENT

In *Mills v. Maryland*, *supra*, 108 S.Ct. 1860, this Court held that the instructions and a sentencing form might have misled the jurors and thus precluded some of them from considering otherwise relevant mitigating evidence. *Mills* did not hold that the Eighth Amendment precludes the states from imposing burdens of persuasion or unanimity on a defendant with respect to mitigating evidence offered at the penalty phase of a capital trial. It does not stand for the proposition that every instructional error which might have misled a jury regarding its statutory duties automatically constitutes a

violation of the defendant's federal constitutional rights. Rather, *Mills* is, as the North Carolina Supreme Court concluded, a "statute-specific" holding. *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12, 35 (1988).

Amici submit that no one system for imposing the death penalty is, or should be, preferred over any other valid system. "[E]ach distinct system must be examined on an individual basis." *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Amici urge the Court to uphold North Carolina's statutes and the instructions given in Petitioner's case not because they are constitutionally compelled, but solely because they are *not* constitutionally prohibited.

ARGUMENT

NORTH CAROLINA'S REQUIREMENT THAT THE JURY UNANIMOUSLY AGREE ON THE EXISTENCE OF MITIGATING CIRCUMSTANCES IS NEITHER PROHIBITED BY NOR MANDATED BY THE EIGHTH AMENDMENT AND SHOULD THUS BE UPHELD.

The Court has established "two separate prerequisites to a valid death sentence. First, sentencers may not be given unbridled discretion in determining the fate of those charged with capital offenses. . . . Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his '"character or record and any of the circumstances of the offense."' *California v. Brown*, 479 U.S. 538, 541 (1987). The Court has also acknowledged that these requirements "are somewhat in

'tension' with each other." *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320, 2331 (1988). Not surprisingly, the states have chosen a variety of approaches to resolve this tension, a diversity which this Court has recognized and endorsed. "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Spaziano v. Florida*, *supra*, 468 U.S. at 464. All too often, however, the Court's interpretation of one statutory scheme becomes the foundation for attacks on other statutes. This occurs regardless of whether the challenged scheme is similar or dissimilar to the one reviewed by the Court. More distressing is the tendency to base such attacks on isolated words or phrases taken out of context.[1] This case illustrates the problem.[2]

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1. For a particularly egregious example compare the Court's passing reference to "residual doubt" in *Lockhart v. McCree*, 476 U.S. 162, 181 (1986), with the defense assertion in *Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2326, that *Lockhart* endorsed a constitutional right to an instruction on residual doubt.

2. *McKoy* is but one of several recent cases in which the Court has been forced to consider issues that had arguably been resolved by earlier opinions. *See, e.g., Boyde v. California*, No. 88-6613, cert. granted June 5, 1989; *Saffle v. Parks*, No. 88-1264, cert. granted April 24, 1989; *Blystone v. Pennsylvania*, No. 88-6222, cert. granted March 27, 1989. Indeed, the Court has heard argument in *Penry v. Lynaugh*, No. 87-6177, a case dealing in part with the constitutionality of the Texas capital sentencing scheme, despite the fact that it "has been unheld by this Court, and its method for providing for the consideration of mitigating evidence has been cited with favor . . . ." *Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2331. *See also Hildwin v. Florida*, ___ U.S. ___, 57 L.W. 3778 (1989) (the Court "once again" was asked to consider the question of judge versus jury fact finding in the sentencing phase of a capital case).

In *Mills v. Maryland*, *supra*, 108 S.Ct. 1860, the Court concluded that jury instructions, in conjunction with a sentencing form, might have misled the jurors in their consideration of mitigating evidence. Specifically, the jurors might not have understood that their rejection of a mitigating circumstance had to be unanimous and that failure to unanimously reject the circumstance allowed the jurors to individually weigh it against the proven factors in aggravation. 108 S.Ct. at 1870. There was no indication that failure to agree rendered the mitigating evidence irrelevant. 108 S.Ct. at 1865, n. 7. Since there was a "possibility that a single juror could block" the consideration of relevant evidence and "consequently require the jury to impose the death penalty," the Court held that the death sentence was unreliable and vacated the state court judgment. 108 S.Ct. at 1870.

Seizing upon the "single juror" reference in *Mills*, Petitioner challenges North Carolina's requirement that the jurors may only weigh against the proven aggravating factors those mitigating

circumstances which they unanimously find the defendant to have proved by a preponderance of the evidence. He contends that "*Mills* and the cases upon which it relies stand for the constitutional rule that the death penalty may not be imposed where there is a barrier to the sentencer's consideration of *any* part of the case for mitigation." Brief for the Petitioner, at 31 (emphasis in original). Amici disagree. In our view, concern that the jury in *Mills* might have been misled about its use of relevant mitigating evidence does not suggest rejection of a State's legitimate "role in structuring or giving shape to the jury's consideration of . . . mitigating factors." *Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2330. Indeed, the Court "normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision . . . ." *Booth v. Maryland*, 482 U.S. 496, 502 (1987).

Moreover, Amici submit that *Mills* does not establish that an Eighth Amendment violation occurs simply because a jury may have misunderstood its obligations under the state's capital punishment scheme. In *Mills*, any confusion engendered by the instructions could have resulted in some jurors failing to consider relevant mitigating evidence, thus violating the requirements of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v.Oklahoma*, 455 U.S. 104 (1982). However, an instructional error which leads the jury to an incorrect interpretation of its duty under state law will not constitute a violation of the Eighth Amendment unless the erroneous interpretation of the law is itself prohibited by the United States Constitution. *See, e.g., Barclay v.*

Florida, 463 U.S. 939, 956 (1983) (consideration of the defendant's criminal record was prohibited by state law, but did not result in the admission of evidence precluded by the Constitution). In such cases the state is free to apply its own harmless error analysis, but the concerns expressed in *Mills* are not implicated. *Barclay v. Florida*, *supra*, 463 U.S. at 956-958; *People v. Brown*, 46 Cal.3d 432, 446-448, 250 Cal.Rptr. 604 (1988).

Amici endorse Respondent's analysis of the North Carolina statutes and the extent to which they comply with the Eighth Amendment. We do not suggest, however, that its approach is the only, or necessarily the best, method of balancing the tension between channeled discretion and admission of mitigating evidence. Rather, it is but one of many constitutionally acceptable schemes.

This Court has been particularly sensitive to the varying approaches chosen by the states as a means of balancing aggravation and mitigation in the penalty phase of a capital trial. *See Turner v. Murphy*, 476 U.S. 28, 34 (1986); *Zant v. Stephens*, 462 U.S. 862, 875-876, n. 13 (1983). As recently noted in *Franklin v. Lynaugh*, *supra*, 108 S.Ct. at 2331, the Court "has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty." *See also Baldwin v. Alabama*, 472 U.S. 372, 374 (1985), which upheld the constitutionality

of a "peculiar and unusual" statutory scheme.

Thus, while North Carolina places a burden of persuasion on the defendant, other states require only that he raise evidence of mitigating circumstances. *See, e.g., Hooks v. State*, 534 S.2d 1453, 1465-1466 (Ala. Crim. App. 1987). Similarly, while some states require the state to prove aggravating circumstances beyond a reasonable doubt, *see, e.g., People v. Brownell*, 79 Ill.2d 508, 404 N.E.2d 181, 194 (1980), others place no burden of proof on the prosecution. *See, e.g., People v. Johnson*, 47 Cal.3d 1194, 1250-1251, 255 Cal.Rptr. 569 (1989). Under some statutory schemes the prosecution must prove beyond a reasonable doubt that aggravation exceeds mitigation, *see, e.g., State v. Williams*, 113 N.J. 393, 550 A.2d 1172, 1206 (1988), but others include no burden on that issue. *See, e.g., People v. Gates*, 43 Cal.3d 1168, 1201, 240 Cal.Rptr. 666 (1987). Although some states require the sentencer to weigh the aggravating and mitigating evidence in order to determine the appropriate penalty, *see, e.g., People v. Brown*, 40 Cal.3d 512, 542-543, 220 Cal.Rptr. 637 (1985), others eschew such a weighing process. *See, e.g., State v. Bellamy*, 293 S.C. 103, 359 S.E.2d 63, 65 (1987). Simply put, "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Zant v. Stephens*, *supra*, 462 U.S., at 875-876 n. 13.

This Court has long recognized the limited and specific nature of its responsibility when reviewing a capital punishment scheme. *Gregg v. Georgia*, *supra*, 428 U.S. at 195. Given past

practice, Amici nevertheless expect that whatever the Court's decision in this case, it will generate renewed attacks on each of the statutory schemes authorizing the death penalty. We urge the Court, therefore, not only to uphold North Carolina's statute, but to reaffirm the position it took in *Pulley v. Harris*, 465 U.S. 37, 45 (1984): "To endorse the statute as a whole is not to say that anything different is unacceptable."

CONCLUSION

For the reasons stated above, Amici respectfully submit that the judgment of the North Carolina Supreme Court should be affirmed.

DATED: June 7, 1989

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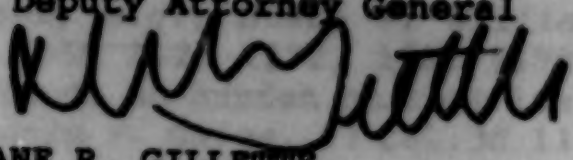

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